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Core Services Review
# of the
Workers' Compensation Board

Executive Summary

May 2002

BRITISH
COLUMBIA

102-05455/

Introduction

The Workers' Compensation Board (WCB) is an independent provincial agency created by the *Workers Compensation Act*. The WCB is responsible for adjudicating and administering benefits to workers, their dependents, and survivors for occupational injury and disease and fatalities. The WCB is also responsible for the province's occupational health and safety program. The WCB operates as a mandatory, no-fault, monopolistic system.

On September 28, 2001, the Honourable Graham Bruce, British Columbia's Minister of Skills Development and Labour, appointed Alan Winter to conduct a comprehensive review of policy and legislation affecting the Workers' Compensation Board (WCB). This was undertaken as part of the government's review of all core services under provincial jurisdiction.

The objective of undertaking this review was to ensure that the WCB has a clear mandate that is relevant to society. The review was to be guided by the 'historic compromise' that underpins the establishment of the workers' compensation system – a compromise that sees workers giving up the right to sue employers over work-related illness and injury in return for security of benefits, and employers agreeing to fund the system in return for protection from legal suit over work-related disability.

The terms of reference for this review set out specific items that were to be covered. A separate process, led by Allan Hunt, was established to cover service delivery issues, while the review process covered by this report was to focus on WCB policy and legislation, including board governance, the appeal structure, major law and policy issues, occupational health and safety regulation, and the definition of roles of certain participants within the workers' compensation system.

The author of this report brought to the process a background of extensive experience in employment and labour law, including appearing before the Royal Commission on Workers' Compensation in B.C. This report and its recommendations draw upon the work of the 1999 Royal Commission, as well as previous reviews of the workers' compensation system.

Key conclusions and recommendations

This report outlines the results of the review process that was undertaken between September 2001 and March 2002. This report is organized into the following sections:

- governance;
- scope and coverage;
- benefits;
- survivor benefits;
- appellate structure;
- reconsiderations/ reopenings;
- policy issues;

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- occupational diseases;
- chronic stress;
- pensions; and,
- vocational rehabilitation.

In each of these areas, this report defines the relevant issues, outlines the current situation, problems, past action and other considerations, and then presents recommendations for action. Conclusions were reached by considering issues from three perspectives: entitlement, cost and administration. Key issues and recommendations are briefly summarized in the following pages.

Governance

Governance of the WCB has been considered by three studies since 1988, each making different recommendations on how to address it. The WCB has been governed under a 'temporary' structure since 1995. Government dismissed the previous Board of Governors at that time, after it struggled with deadlocks on many issues.

The review concluded that the most appropriate governance structure would be a small board of directors composed of part-time members. This board would focus on policy, oversight and stewardship of the system. Administration would be left to WCB management. Worker and employer representatives would continue to sit on the board, but a majority of board members would be representatives of the public interest.

Key recommendations:

- The WCB should have seven part-time voting members on its Board of Directors. Members would include a chair, one worker representative, one employer representative, and four public interest representatives, one of whom would represent interests of persons with disabilities. The Lieutenant Governor in Council should make all appointments.
- The directors should act in the interests of the workers' compensation system as a whole and all it's stakeholders.
- The president of the WCB should be appointed as a non-voting member of the board so that he/she has an understanding of Board decisions and may provide input to the Directors.
- The head of the Appeal Tribunal should not sit on the board to reflect the independence of the executive and judicial functions of the system.
- The government should not be directly represented on the board.

Scope and coverage

The review's terms of reference asked that it consider whether the WCB should continue to provide universal coverage. Currently, approximately 93.9 per cent of British Columbia workers are covered, as a result of 1994 amendments that brought approximately 24,000 additional employees within the compulsory scope of the *Act*. Previous to those amendments, coverage was 'exclusionary,' in that workers were not covered unless they were employed in designated industries; with the amendments, coverage became 'inclusionary' or universal, in that workers were covered unless specifically excluded.

The review considered arguments that have been made in favour of maintaining universal coverage and those in favour of permitting certain industries to opt out of WCB coverage. The review concluded that the concept of universal workers' compensation coverage should be maintained in order to preserve equity and ensure consistent coverage for all workers.

Key recommendation:

- The principle of universal workers' compensation coverage for workers and employers in B.C. should be retained.

Benefits

The review considered questions around the rate of compensation and the basis upon which it is calculated. This included considering whether benefits should result in recovery of the full economic losses suffered by the worker, or a lesser amount. The review concluded that the history of the WCB in British Columbia and the experience in other jurisdictions indicate that benefits are generally expected to provide fair protection against economic loss, rather than full protection. The review also considered how benefits are calculated. In British Columbia, they are currently based on a percentage of gross average earnings, whereas all but one other Canadian jurisdiction base benefits on varying percentages of net average earnings. The review addressed what would constitute fair compensation if the WCB moved to calculating benefits based on net average earnings rather than the current 75 per cent of gross earnings. The range in other provinces is between 75 and 90 per cent, with most at 85 or 90 per cent.

The review considered whether WCB benefits should be integrated with other income maintenance benefits or 'stacked' as they are currently. Stacking means that benefits are not adjusted to reflect benefits coming from one or more other sources. Integration takes place when one benefit is reduced to reflect benefits coming from another source. Other sources may include Canada Pension Plan disability benefits, private insurance paid by the worker, and group insurance paid by the employer. Other jurisdictions take a variety of approaches to the question of integration versus stacking, reflecting the complexity of the issue and distinctions between public and private benefits.

In addition, the review looked at minimum and maximum levels of compensation benefits, waiting periods, calculation of workers' average earnings and the inflation indexing of benefits.

Key recommendations:

- Benefits should be calculated using 90 percent of the worker's net average earnings.
- Only 50 percent of Canada Pension Plan benefits should be integrated with WCB benefits, representing the employer's share of the CPP benefit only. However, private benefits should be stacked to reflect the private contractual matter between and employer and employee.
- Benefits should be adjusted for inflation once per year using a consumer price index formula of "CPI less one percent", with a minimum adjustment of zero percent and a maximum of four percent per year.
- Existing discretion around calculating a worker's average earnings should be narrowed to ensure that the same method is used for most workers. In most cases, long-term average earnings should be based on the worker's earnings from the twelve months prior to injury or disablement from disease. For short-term benefits, the worker's actual rate of pay on the date of injury should be used for the initial period of ten weeks from the date of injury.
- For the purpose of calculating benefits, the maximum wage rate should be 190 percent of the average industrial wage in B.C. and the minimum compensation for partial and total permanent total disability should be based on the provincial minimum wage.

Survivor benefits

The death of a worker from an occupational injury or illness is one of the most tragic events in the lives of survivors. It is essential that surviving family members are dealt with fairly and sensitively. Currently, the WCB provides a pension for life to dependent surviving spouses, except for childless spouses under the age of 40, who instead receive a lump sum payment. WCB benefits are reduced by the amount of any Canada Pension Plan benefits that the survivor receives.

The review considered a wide range of issues relating to survivor benefits and makes numerous recommendations in this area. Among the issues that are dealt with are concerns over the equity of treating childless spouses under 40 years old differently from other spouses and the inconsistent integration of CPP benefits for surviving spouses compared to the stacking of CPP benefits for injured workers. The review looked at pension structure, the duration of benefits, compensation for non-economic losses, and the integration of other benefits with WCB benefits.

Key recommendations:

- Calculation of pension entitlement for surviving spouses and other dependents should continue to be based on the pension that the deceased worker would have received had he/she sustained a permanent total disability.
- A pension should be provided to all surviving childless spouses – including those under the age of 40 – that provides progressively larger pensions to older spouses.
- Where a worker's death was due to an occupational disease, survivor benefits should be calculated using an apportionment approach.
- A one-time lump-sum payment for non-economic loss should be provided to all spouses. It should be progressively larger for younger spouses.
- Survivor pensions should end when the worker would have reached the age of 65.
- Where the worker's work-related disability did not arise until after the worker had retired, survivor benefits for economic loss will not be paid.
- A post-retirement benefit equal to five percent of each pension payment should be provided to surviving spouses when entitlement to a survivor pension ends.
- Only 50 percent of Canada Pension Plan benefits should be integrated with survivor benefits, representing the employer's share of the CPP benefit only.

Appellate structure

The *Workers Compensation Act* and WCB policies set out various appeal processes relating to claims, prevention and occupational health and safety, and classification and assessment. On claims issues, there are three levels of appeal, including the Workers' Compensation Review Board, the WCB Appeal Division and the Medical Review Panel.

The review addressed numerous issues that indicate the need to reform current appeal processes and structures. The problems identified with the current system include the following:

- it is highly complex;
- timeframes for appeals vary widely and can take from three to five years or longer to complete;
- the multi-level appeal process has resulted in inconsistent decisions;
- the existing process does not provide clear finality;
- the Medical Review Panel has sometimes made decisions inconsistent with WCB policy; and,
- the existence of three separate appeal structures is inefficient.

To deal with these problems, the review looked at the number of levels of appeal that should be available, how appointments are made, the role of medical advisors, the process for requesting a review of an appeal, timelines for decisions, and other issues.

Key recommendations:

- Introduce a new two-level review and appeal process, including internal review and an external appeal tribunal that includes a medical review function. Internal review officers should be appointed by the WCB, while government should appoint the chair of an appeal tribunal, with the chair appointing other members. Internal and external appeal levels would generally have substitutional authority to cancel, vary or maintain the decision upon which an appeal is based. The internal review is intended to be a simplified and flexible process that can apply corrective justice to the matter before it, and which would become an essential component of the WCB's overall quality assurance program.
- Medical review panels should only be accessible through the external appeal tribunal, and would provide non-binding advice only.
- Establish clear timelines for appeals, including limits on how long an internal review or appeal tribunal can take to deliver a decision.

Reconsiderations/ Reopenings

The terms of reference for the review included a request to consider whether there should be limits on the ability to reconsider, reopen and conduct reinquiries into past decisions relating to compensation, occupational health and safety, employer assessment or classification. The existing legislation provides the WCB with broad powers to reconsider previous decisions.

The review concluded that the WCB's broad discretion to review decisions makes it impossible to truly bring finality to matters that were previously dealt with by the WCB. Key recommendations:

- The WCB's existing power of reconsideration should be eliminated, except in cases where an aggrieved party requests reconsideration of a decision made by an initial decision-maker. The authority of the WCB to reconsider the initial decision would end on the earlier of 75 days after the date the decision was communicated, or the date that the party applies for an internal review of the disputed decision. The WCB would have statutory discretion to determine whether to conduct such a reconsideration.
- Reinquiry should be permitted, but only upon the presentation of new evidence that has a substantial and material impact on the previous decision. The number of reinquiries from a specified party may be limited by the WCB where appropriate to prevent abuses of the system.
- Claims may be reopened where there has been significant change in a worker's compensable condition since the time of the original injury.

Policy issues

WCB policies play an important role in the administration of British Columbia's worker's compensation system, but they are not defined in the *Act*. Given the complexity of the system, policies are essential. It is neither feasible nor desirable for the necessary detailed provisions to be included within legislation.

Current policy is not clear on how policy is formed and administered; one existing policy even suggests that WCB policy is not binding on the adjudication of individual claims. This contradicts other statements that indicate that policy should be followed.

The review considered the role of policy and how policies might be better managed, made more clear and approached in a more consistent manner.

Key recommendations:

- The *Act* should define policy and make clear that it should be applied to all WCB decisions, including Appeal Tribunal decisions.
- The Board of Directors should retain ultimate responsibility for creation and approval of policies.
- When the Board of Directors makes decisions that effectively change lawful policy, the changes should be reflected in the written policy, and should apply consistently in the future, but not retroactively to past decisions.
- The Appeal Tribunal may deem policy unlawful using a "patently unreasonable" standard, meaning interpretation of the policy in light of the Act could not be rationally supported. Where this occurs the Board of Directors will be notified and will have the chance to confirm the Tribunal's finding or refer it to the BC Court of Appeal.
- The WCB Policy Bureau should continue to exist under its current reporting relationship.

Occupational diseases

British Columbia has provided worker's compensation coverage for occupational diseases since the legislation first came into effect in 1917. Over time, the range of occupational diseases and the body of medical and scientific knowledge related to these conditions has expanded. As a result, the complexity of determining causation has increased substantially.

Currently, workers are entitled to full compensation where workplace exposure had 'causative significance' in contracting an occupational disease. This is an 'all or nothing' situation. Alternatives to the "all or nothing" approach were explored by the review, including an 'apportionment' approach, which would provide benefits in proportion to the causative influence that work-related factors had on the development of the workers' disease.

The *Act* currently does not recognize long latency periods for certain occupational diseases, which often do not develop until long after the exposure.

The review concluded that occupational diseases should continue to be covered by the WCB, but that the system should be updated to more flexibly take into account causation and to recognize long latency periods.

Key recommendations:

- Coverage for occupational diseases should be continued. An apportionment approach to benefits, based on causative significance of occupational versus non-occupational factors should be adopted.
- The WCB should pay 100 per cent of health care benefits and vocational rehabilitation, while there should be four levels of apportionment for compensation: 25, 50, 75 and 100 percent.
- The WCB should take into account and provide for the long latency periods that are known to exist between exposure and the onset of certain occupational diseases.

Chronic stress

The review's terms of reference asked that consideration be given to how the WCB should deal with "chronic stress" as a condition. For the purposes of this report, the term refers to claims for psychological impairment caused by mental stimuli acting over time, and not to impairments caused by a traumatic event, such as post-traumatic stress disorder.

Compensating chronic stress is a complex area, particularly because everyone experiences stressful situations as part of their everyday life, the effects of stress are subjective to each worker and chronic stress generally arises from a myriad of interacting factors, some of which may be work-related and some of which may be related to a worker's private life.

It is not clear whether chronic stress should be characterized as personal injury or occupational disease. For this reason, the review considered chronic stress separately from both. Current WCB policies on chronic stress are somewhat ambiguous, if not inconsistent, and the legislation is silent on these conditions. As a general rule, however, claims for psychological impairment, where no traumatic workplace incident has occurred, are denied by initial decision-makers and the review board, but sometimes accepted by the Appeal Division.

Several other Canadian jurisdictions have specifically excluded mental stress claims, except when such a claim arises as an acute reaction to a traumatic event. There is concern that increased numbers of chronic stress claims could result in dramatically increased costs.

The review considered a range of arguments in favour of excluding chronic stress claims, and a similar range of arguments in favour of providing coverage under the *Act*. It concluded that coverage should be provided, but only when several specific requirements are met.

Key recommendation:

- Legislation should specifically indicate the conditions that must be met for a worker to receive compensation for chronic stress.
- Compensation should be based on an objective assessment of verifiable and excessive stressors that are not related solely to generic work processes. Workplace-related stressors must represent more than 50 percent of causal significance leading to psychological impairment.

Pensions

Currently, pensions are provided to workers when an occupational injury or diseases causes the worker to suffer a permanent disability, whether partial or total. This kind of permanent disability award is assessed and becomes payable when the impairment has stabilized.

The WCB uses two methods to calculate a worker's pension – the loss of function method and the projected loss of earnings method. The first is based on the nature and degree of the injury using a Permanent Disability Evaluation Schedule, which assigns an objective impairment rating for each worker. The second looks at earnings prior to the impairment compared to earnings or earnings potential afterward. The worker receives whichever is the higher amount calculated using each of the two methods. This is referred to as the 'dual system'. Concerns have been raised regarding the cost, administration and fairness of the current system.

Pensions are generally payable for the life of the worker, which has raised concern that workers may be over-compensated. Payment of pension benefits for the lifetime of a worker does not recognize that workers' income usually decreases after retirement age and most workers set aside some portion of their earnings for their retirement years to prepare for this reduced income.

Currently, workers can receive compensation for subjective complaints of chronic pain. If chronic pain makes a worker unable to work or reduces their ability to work, they are eligible for a loss of earnings pension.

The review considered a range of questions related to pensions, including whether the current 'dual' method of calculating the pension payable should be retained, the issue of continuing pensions beyond retirement age, compensation for chronic pain and how employability should be assessed for the purposes of a loss of earnings pension.

Key recommendations:

- The dual system of calculating pensions should be continued, with emphasis placed on functional awards. Specific criteria should be identified for the use of the loss of earnings method in exceptional circumstances when the pension award calculated by the functional method is considered to be significantly inadequate in light of the worker's particular circumstances. The loss of earnings method should not be used in cases of chronic pain.
- The WCB Permanent Disability Evaluation Schedule should be reviewed to ensure it reflects current medical and scientific knowledge, is understandable and provides adequate guidance for decision-makers. Chronic pain should not be factored into this schedule.
- A separate impairment rating schedule should be developed to determine the impact of chronic pain on a worker's earning capacity, to a maximum of 20 percent. This rating would be combined with the level of impairment from other factors to determine a worker's overall loss of function pension entitlement.
- Pensions should end at the age of 65.
- Once pension award payments cease the worker should receive a post-retirement benefit equal to five per cent of pension payments that the worker has received. Workers should also be able to choose whether to contribute to this benefit through a deduction of up to five percent from their pension payments.

Vocational rehabilitation

Currently, the WCB has broad discretion to provide vocational rehabilitation services to injured workers, and supports the training or retraining of surviving dependent spouses. In the absence of specific direction in legislation, vocational rehabilitation is guided by WCB policies. In practice, vocational rehabilitation consultants are required to make many difficult decisions guided by their common sense, which has raised issues around inconsistencies and unfairness.

The review considered whether vocational rehabilitation should continue to be at the discretion of the WCB, or be made mandatory. It looked at what additional direction in this area might be provided by legislation, how the need for vocational rehabilitation services can be consistently identified, whether workers should be required to do what they can to return to work, whether they should be required to relocate in order to obtain employment, and whether employers should be required to accommodate a return to work by injured workers.

Key recommendations:

- The WCB should maintain its discretionary authority in providing vocational rehabilitation services. The *Act* should provide some statutory direction in this area.
- The *Act* should be amended to require that vocational rehabilitation services be provided to disabled workers who need it to maximize their earnings. Early intervention should be a priority. The primary objective of the services should be a return to employment. However, in the event that the WCB determines that this objective cannot be reasonably achieved, the final objective would be to seek to enhance the worker's employability. These services should be provided in a collaborative manner, with the worker and the WCB co-operating in order to ensure success.
- Guidelines should be developed regarding deeming a worker's post-injury earnings ability to make it a more objective process. Deeming should not be undertaken when a worker is participating in a vocational rehabilitation process.

- The WCB should have the authority to require that a worker relocate in order to obtain alternate employment, but only under specific conditions, and with the WCB or another government agency paying the expenses of relocation.
- Due to the broad discretion required by vocational rehabilitation consultants, the scope of review for vocational rehabilitation decisions by subsequent decision-makers should be limited.

Ministry of Skills Development and Labour
May 2002

BRITISH
COLUMBIA

March 11, 2002

Office of the Minister
Ministry of Skills Development and Labour
310 Parliament Buildings
Victoria, BC V8W 9E2

Attention: The Honourable Graham P. Bruce
Minister of Skills Development and Labour

Dear Sir:

**Re: CORE SERVICES REVIEW OF WORKERS' COMPENSATION BOARD
- Major Law and Policy**

Pursuant to the Terms of Reference (dated September 2001) with respect to the above Core Services Review, I am pleased to submit my Final Report.

Yours truly,

Alan Winter

ALAN WINTER
WCB Core Reviewer

**Ministry of Skills
Development and Labour**

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Core Review

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SUMMARY OF RECOMMENDATIONS

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ACKNOWLEDGEMENTS

Conducting a one-person review of an area as comprehensive as the workers' compensation system in BC has not been an easy task. Fortunately, I was able to draw upon the resources, knowledge and experience of various organizations and individuals. I wish to acknowledge their efforts, and extend my appreciation. For those that I may have inadvertently omitted to mention, my apologies. All of your input was greatly appreciated.

First, I am greatly indebted to the work conducted by the most recent Royal Commission on Workers' Compensation in British Columbia (Gurmail S. Gill, Commission Chairman; Oksana Exell and Gerry Stoney, Commissioners). As will be observed throughout this Report, I have relied extensively on the two Reports submitted by the Royal Commission, in particular its *Final Report* dated January 20, 1999.

Second, the WCB's efforts in providing timely information and assistance whenever requested was unfailing. To all at the WCB with whom I had the pleasure of meeting for one reason or another as my review progressed, thank you for your efforts. However, there are several representatives which I must acknowledge personally.

Maureen Nicholls, the Chair of the Panel of Administrators, always made herself available to meet with me whenever I requested (which was quite often). Her ability to help me focus on the issues at hand was greatly appreciated. Special thanks should also go to Sheryl Wynne and Sheila Wong.

Ralph McGinn, the President and CEO of the WCB, was also of great assistance. I met on numerous occasions with Ralph and the Division Vice-Presidents (David Anderson, Sid Fattedad and Roberta Ellis), as well as many others, to review the administrative impact of the various avenues I was contemplating.

The WCB's Policy Bureau deserves full accolades. Ajit Mehat, the Director General of the Policy Bureau, and several of the Policy Directors and Policy Analysts, continually responded to my frequent requests for further information. Their responses were both timely and to the point.

Third, I met with numerous representatives from each of the three appellate levels in the existing system, who provided useful insights as I deliberated upon the reforms I have proposed to the appellate structure. Special appreciation goes to John Steeves (Chief Appeal Commissioner of the Appeal Division), Brian King (Chair of the Workers' Compensation Review Board) and Leigh Sheardown (Registrar, Medical Review Panel Department).

Fourth, I was fortunate to receive written submissions, and to meet on two occasions, with representatives from each of the following organizations:

- British Columbia Federation of Labour (Jim Sinclair, President)
- Employers' Advisory Office (Ray Bozzer, Director)

- Employers' Coordinating Group, a coalition of the Business Council of BC (Jerry Lampert, President and CEO), Coalition of BC Businesses (Suromatra Sanatani, Chair), and Employers' Forum to the WCB (Ian May, Chair)
- Workers' Advisory Office (Blake Williams, Director)
- Workers' Compensation Advocacy Group (James F. Sayre, Staff Lawyer)

Their collective submissions and comments were most helpful in assisting me to see the same issue from several different perspectives.

Fifth, there are several individuals who took the time to discuss certain issues with me when requested, and/or were part of the process of this core review. My thanks go to Jim Dorsey, Allan Hunt, George Heyman, Stan Lanyon, Louise Logan, Wendi Mackay, Eric Mitterndorfer, Dan Perrin and Bruce Rollick for their time and their efforts.

Last, but certainly not least, there is Brenda White. Brenda has been the administrative assistant for both Core Reviews. If you think the Report which follows is a tad long, just reflect on the efforts that Brenda expended in typing; revising; formatting; copying; and anything else that ends in "ing". And she always was enthusiastic, eager and a joy to work with. Thanks Brenda for making a difficult task easier to do.

Chapter 1: INTRODUCTION

The Provincial Government has established two core services reviews to be conducted with respect to the workers' compensation system in British Columbia. One review is focused on Service Delivery, and is being conducted by H. Allan Hunt, the Assistant Executive Director of the W.E. UpJohn Institute for Employment Research in Kalamazoo, Michigan.

The other core review involves the consideration of the major law and policy issues which exist in the current workers' compensation system. The writer has been engaged to conduct this review. The results of my review are set out in this Report.

The Workers' Compensation Board ("WCB") is an independent provincial authority created by the *Workers Compensation Act*. The WCB is responsible for adjudicating and administering benefits to workers and their surviving dependants in the circumstances where an occupational injury, disease or death has occurred. The WCB is also responsible for the regulation, administration, adjudication and enforcement of the provincial occupational health and safety regime.

The workers' compensation system in BC impacts every employer and worker in the Province to some degree. Participation in the compensation scheme is mandatory, and the occupational health and safety program is applicable to all Provincial employers and workers. To describe the overall BC workers' compensation system as being complex would be an understatement.

The Government provided written Terms of Reference (dated September 2001) for the conduct of the two core services reviews. The overall objective of the reviews is described on the first page of the Terms of Reference.

> The objective of the review is to ensure the Board has a clear mandate, which is relevant to society, and to determine ways in which the WCB can improve service delivery for both workers and employers. . . . Broad objectives include:
>
> - Making recommendations with respect to the legislative and policy framework WCB requires to carry out its mandate effectively;
> - Making recommendations to eliminate overlapping jurisdictions and multiple proceedings;
> - Making recommendations to streamline administrative procedures.
>
> Objectives that are specific to the WCB include:
>
> - Making recommendations to ensure the long term viability of the workers' compensation system; and

- Making recommendations that will improve the service delivery of WCB programs and services.

Four pages of the Terms of Reference are specific to the review of the major law and policy issues. A multiplicity of questions were raised with respect to the following broad topics:

- Board Governance
- Appellate Structure and Related Topics
- Scope and Coverage
- Pensions
- Vocational Rehabilitation
- Benefits
- Lack of Finality
- Occupational Diseases
- Funding the System
- Fatalities/Survivor Benefits
- Occupational Health and Safety and Regulatory Review
- Role Clarification/Definition (which raised several questions concerning the roles to be played within the workers' compensation system by certain specified participants).

Two specific objectives were identified for the major law and policy review – (1) to establish the extent to which the system should continue to provide the current level and range of coverage, and (2) to bring specific policy components in line with other Canadian jurisdictions.

Needless to say, the above mandate left me with a daunting task, which was initially required to be completed within a period of 3½ months. Required extensions were provided, and this Report reflects my efforts over a total period of 5½ months.

Notwithstanding this extended time frame, the depth, variety and complexity of the issues to be addressed ultimately required the overall scope of my review to be condensed. Almost all of my efforts were concentrated on the issues related to governance, the appellate structure, and the compensation aspect of the workers' compensation system. As will be observed in the final chapters of this Report, little time was left for the issues associated with the funding of the system, and with occupational health and safety, to be fully canvassed. The relative brevity of my consideration of these two areas should not be perceived as any belittlement of their overall importance to the workers' compensation system in BC. To the contrary, I believe these issues are of equal importance to the overall system, and I would no doubt have given similar detailed consideration to these issues had time permitted me to do so.

However, I have fortunately had access to a substantial resource to aid me in my deliberations. A comprehensive review of all aspects of the workers' compensation system was recently conducted by the Royal Commission on Workers' Compensation in British Columbia, which was appointed in November 1996. The Royal Commission release two Reports:

(i) its October 31, 1997 *Interim Report* on Sections 2 and 3(a) of the Commission's Terms of Reference (which dealt with occupational health and safety issues, as well as certain issues associated with the provision of fatality benefits), and

(ii) its *Final Report* dated January 20, 1999 (which dealt with all other aspects of the workers' compensation system in BC).

The Terms of Reference for my core review stated the following on page 2:

> In addition, the review will take into consideration the findings of the Royal Commission as set out in the Royal Commission's Interim and Final Reports.

I have taken this direction to heart, and have extensively referred to the discussions and recommendations of the Royal Commission throughout this Report.

The first question asked of every core services review is whether the mandate, program, activity or agency under review continues to serve a compelling public interest. My response, with respect to the workers' compensation system in BC, is an unqualified yes.

The genesis of our workers' compensation system arises from what is referred to as the "historic compromise". Pursuant to the "historic compromise", the workers' gave up the right to sue their own employers in court, and to seek full damages for all economic and non-economic losses they had incurred as a result of a work-related injury or illness. In return, workers were provided protection against income losses arising from a work-related injury or illness, regardless of fault.

For their part, employers were required to fund, on a collective basis, the workers' compensation system which provided the no-fault benefits to disabled workers. In return, employers were protected from legal actions being brought by disabled workers, and from the potential liability for a substantial amount of damages (which could have a devastating impact on the viability of an individual employer).

In my opinion, these underlying premises are as valid today as they were in 1917 when BC's first workers' compensation legislation was enacted. In fact, the "historic compromise" foundation of our workers' compensation system is specifically adopted on page 1 of my Terms of Reference:

> The review will be guided by the "historic compromise" that underpins the establishment of the workers' compensation system, . . .

It is my further opinion that the continuation of the workers' compensation system is far preferable to the primary alternative – a return to the fault-based tort action advanced through the court system.

However, the continuation of the workers' compensation system does not mean that the existing system in BC should be maintained. To the contrary, significant changes must be made to ensure that the workers' compensation system in BC is fair, efficient and viable.

Returning to the concept of the "historic compromise", I believe that there are four significant participants within the overall workers' compensation system.

(i) The Government determines, through the enactment of the appropriate legislation, what the parameters of the workers' compensation system will be, in terms of the entitlements and obligations associated with that system.

(ii) Workers, who are the recipients of the benefit entitlements set out by the Government in the legislation.

(iii) Employers, who are responsible for funding the workers' compensation system defined by the legislation.

(iv) The WCB (and any appellate tribunal within the system), which is responsible for the administration, adjudication and enforcement of the entitlements and obligations set out in the legislation.

The purpose of this Report is to assist the Government with respect to fulfilling its responsibility in determining the appropriate statutory entitlements and obligations which will comprise the workers' compensation system in BC. However, the focus of my deliberations, in regard to most of the significant issues I was required to address in this Report, was on the respective interests of the remaining three participants. In other words, before arriving at a conclusion on any given issue, I considered it from each of the following three perspectives – entitlement, cost and administration. I want to elaborate upon each of these three perspectives.

(i) Entitlement – As will be more fully addressed in a later section of this Report, my perception of the "historic compromise" is that it is premised upon providing fair – not full – protection to the workers against economic loss arising from a work-related injury or illness. In determining what I perceive to be "fair" compensation benefits, I have considered the views of the key stakeholders, the recommendations and discussion of the most recent Royal Commission, and the benefit levels that have been adopted in other Canadian jurisdictions.

There are several instances where I determined that the factor of entitlement had to be given the paramount consideration. For example, I was tempted to exclude psychological impairments caused by mental stimuli over time (where no traumatic workplace incident has occurred) from coverage under the *Act*. However, I believe that such an exclusion would be inconsistent with one of the fundamental principles which led to the establishment of the workers' compensation system, as reflected in the "historic compromise" – the entitlement for a worker to receive compensation benefits for a disability which is "truly work-caused".

Another example concerned the potential adoption of the "actual loss of earnings" method for calculating a permanently disabled worker's entitlement to compensation benefits. Unless significant restrictions are placed upon the manner in which the actual loss of earnings method is applied, the administration of such a system would become too onerous. However, I believe that the adoption of such restrictions would have too great of an adverse impact on the disabled worker's overall entitlement to compensation benefits.

(ii) Costs – The workers' compensation system adopted in BC must be financially viable – ie: the level of entitlement for workers must be balanced against the costs to employers of funding the system. In my opinion, there is only so much which the system can reasonably expect employers to pay through assessments to the Accident Fund. How much is obviously a question which will be the subject of substantial debate between workers and employers.

I believe a relevant factor to be considered is the level of compensation benefits which are provided in other Canadian jurisdictions. Employers in BC compete with employers in these other jurisdictions. The benefits provided by the BC workers' compensation system, and the resulting costs associated with the funding of these benefits, should not place employers in BC at a competitive economic disadvantage vis-à-vis employers in other jurisdictions.

In reviewing the financial information provided to me by the WCB, I have been convinced that the current workers' compensation system in BC is becoming unsustainable. The WCB incurred a deficit (unaudited) in 2001 of $286.8 million. If the status quo of the current system is maintained the WCB projects further deficits in 2002 (of $422 million), 2003 (of $301 million), 2004 (of $251 million) and 2005 (of $181 million). These projections will result in the WCB assuming an unfunded liability in 2002 of approximately $288 million, which will continue to grow to an overall unfunded liability of approximately 1 billion dollars by the end of 2005.

I have made several recommendations which will have a significant impact on the overall cost of the system. For example, I refer to my recommendation that pension awards to permanently disabled workers should cease at age 65 (as opposed to the current system where the loss of function and, in varying degrees, the loss of earnings pensions are paid for the lifetime of the worker). However, I based my recommendation on the merits of the issue (as will be discussed in the "Pensions" section of this Report), and not on the basis of seeking to achieve cost reductions.

There is only one recommendation I have made primarily on the basis to ensure the financial viability of the workers' compensation system – the recommendation to revise the current indexing of compensation benefits (pursuant to Section 25 of the *Act*) to reflect an annual adjustment based on the formula of CPI less 1%, with a maximum annual adjustment of 4%.

(iii) Administration – I was also sensitive to the fact that I could not propose a system which would become an administrative nightmare for the WCB to apply.

For example, in recommending that the compensation rate in BC be based upon the net average earnings of the worker (as opposed to the current gross average earnings), I proposed the adoption of a system which could be implemented in as administratively efficient a manner as possible. Similarly, I rejected the adoption of the "actual loss of earnings" pension system due to the onerous administrative aspects I felt were associated with that system.

There are several additional matters I want to raise before concluding my introductory comments. **First**, I want to emphasize that my mandate covered a review of the major issues in both the legislation and the published policies of the WCB. Although the primary focus of my review has been on the provisions in the *Act*, I have raised numerous recommendations throughout this Report that will require revisions to be made to the WCB's published policies.

Some of the policy issues that I have recommended be revisited will be difficult ones to address and will raise controversies among the key stakeholders. My recommendation that the Board of Directors revisit the intent and application of the projected loss of earnings method of pension assessment (pursuant to Section 23(3) of the *Act*) is one example. The requirement for the WCB to develop a permanent impairment rating schedule for chronic pain may well be another.

Nevertheless, I trust that the governing body of the WCB will initiate the consideration and, where required, implementation of my recommended changes to its published policies on a timely basis. It is clear that this objective is one of the goals the Provincial Government seeks to achieve as part of this core services review – or else why would the Government have included the review of the major policies of the WCB within my Terms of Reference?

Second, although the workers' compensation system is made up of several identifiable components – such as compensation services, assessments, prevention, governance and appellate functions – they are all closely integrated. It is often easier to seek to dissect one aspect of the system from another when considering the areas within the system that require review and change. However, this is not an approach which can be taken if the goal is to craft an overall system which is efficient, effective and credible. To achieve this goal, one must start be accepting the concept of the all inclusive nature of the workers' compensation system in BC.

For example, I have recommended that the final level of appeal should be to an Appeal Tribunal which is external and independent from the WCB. However, the appellate function to be served by this external tribunal is an essential and integrated component of the overall system. This "essential and integrated" focus is the basis upon which I recommended that the published policies of the governing body of the WCB must be applied not only by the decision-makers within the WCB, but also by those within the external Appeal Tribunal.

Similarly, the WCB and the external Appeal Tribunal themselves must accept that they are interrelated parts of the overall workers' compensation system. As such, both organizations must be prepared to develop and maintain a close and effective working relationship with each other.

Third, just as the workers' compensation system itself is made up of several inter-related components, the areas I have been asked to review, and the recommendations I have made, are also closely integrated. For example, it is difficult, if not impossible, to craft a comprehensive compensation system without appreciating how temporary wage loss benefits, pension entitlement and vocational rehabilitation all interact with respect to the final object of providing fair compensation to disabled workers. What impressed me the most during this review is how often I was required to revisit tentative recommendations I had made in one section of this Report, as a result of my consideration of the relevant issues in another section.

Finally, I want to end with an apology of sorts. For those involved in the workers' compensation system who have previously dealt with me, it will not come as a surprise that I tend to be verbose when expressing myself in writing. This project has similarly expanded beyond the initial expectations. (When I was initially engaged to conduct this review, I asked whether the Government wanted written recommendations only, or some discussion to go along with the recommendations. I was requested to provide some discussion, but to keep it brief. I did try to forewarn the Government that brevity has never been one my strengths.)

Notwithstanding the length of this Report, I believe it was essential to try to let others understand how and why I made the recommendations contained in this Report. I have therefore tried to express my thought process, by identifying the problems I perceived to exist within the system, the potential solutions I felt were available, and the reasoning as to why I chose the directions I did.

Chapter 2: GOVERNANCE

A. Overview

It is anticipated by all of the major stakeholders involved in the workers' compensation system in British Columbia, including the WCB itself, that the current Provincial Government will be initiating significant changes to all aspects of the system. For there to be any realistic prospect that these changes will be successfully embraced and implemented, it is my firm view that a strong, credible and stable governance structure must first be put into place. Unfortunately, the perception amongst many of the system's stakeholders is that such a governing structure has not been in place for most of the last 10 years.

A Board of Governors for the Workers' Compensation Board (the "WCB") was created in June 1991, consisting of 13 voting members – five who were "representative of employers", five who were "representative of workers", two who were "representative of the public interest" and the Chair. In July 1995, the Provincial Government dismissed the Board of Governors (which was referred to by the then Minister of Labour as being "dysfunctional"), and replaced it with the current Panel of Administrators.

The Panel of Administrators was initially intended to be a temporary governing structure until after the Royal Commission on Workers' Compensation provided its recommendations on the issues of governance (which the Royal Commission did in its Final Report released in January 1999). Nevertheless, more than six years after its initial appointment, the "temporary" Panel of Administrators governing structure is still in place. During this period of time, there have been five persons appointed as the Chair of the Panel of Administrators.

B. Previous Reviews of Governance

There have been three separate reviews of the governance structure of the British Columbia workers compensation system within the last 13 years:

(i) The October 31, 1988 Report and Recommendations of the Advisory Committee on the Structure of the Workers' Compensation System of British Columbia, chaired by Donald R. Munroe, Q.C. (the "*Munroe Report*");

(ii) The April 18, 1995 Report and Recommendations concerning the Workers' Compensation Board of British Columbia Board Governance Review, submitted by Patrick O'Callaghan and Judi Korbin (the "*O'Callaghan/Korbin Report*"); and

(iii) The Final Report of the Royal Commission on Workers' Compensation released on January 20, 1999, wherein the topic of "Governance and Accountability in the Workers' Compensation System" was considered in Volume I, Chapter 3 (the "*Royal Commission Final Report*").

I have thoroughly reviewed all three of the above Reports and, as will be seen throughout this section, have relied significantly on one or more of the Reports where I believed it was appropriate to do so.

C. What is Governance?

The *Royal Commission Final Report* defined "governance" in the following manner on page 7:

> Governance includes the structure and the processes used to direct or govern the affairs of an organization. It refers to the mechanisms for setting the organization's direction and overseeing the organization's management so that the organization effectively fulfills its mandate. ...
>
> The Governance structure includes the governing body of the organization and its relationship to other parts of the organization. ...
>
> Governance processes set the direction and oversee the management of an organization.

D. The Name of the Governing Body

I have reflected on three names for the governing body of the WCB:

(i) The Panel of Administrators;

(ii) The Board of Governors; and

(iii) The Board of Directors.

I immediately dismissed the Panel of Administrators option – for the simple reason that it is not for the governing body to be responsible for the "administration" of the WCB. This responsibility must lie with the management of the WCB.

As noted above, the Royal Commission defined governance as including the structure and the processes used "to direct or govern" the affairs of an organization. Based on my acceptance of this definition, I am generally comfortable with either of the two remaining designations for the governing body. However, based upon my hope that the upcoming changes to the workers' compensation system will lead to a new era of enhanced stability and credibility for the system, and in recognition of the concerns that arose from the previous Board of Governors era, I lean towards a new designation for the new governing structure.

Accordingly, it is my recommendation the new governing structure of the WCB be called the Board of Directors.

E. Size and Composition of the Board of Directors

In my opinion, the size and composition of the Board of Directors are integral to the governing body's ability to efficiently and effectively fulfill its responsibilities within the BC workers' compensation system. I will now address each of these two components.

1. Board Size

The Board must be large enough to achieve an effective balance between the individual's ability to fulfill his/her role as a Director of the WCB, and to meet the other professional or business responsibilities he/she may have. (As will be discussed later, I envision that the representatives on the Board of Directors would be appointed on a part-time basis.) Accordingly, the anticipated workload at the governance level must be shared equitably amongst a sufficient number of Directors in order to minimize the disruption the workers' compensation responsibilities would have on any particular Director.

One of the ways this balance (between a Director's workers' compensation and other responsibilities) can be achieved is through the utilization of various Board Committees in order to have primary responsibility for a particular area fall within the mandate of a smaller group of Directors. Accordingly, the size of the Board must be large enough to have several Committees established with minimum repetitiveness of the same Directors being appointed to most, if not all, of the Committees.

On the other hand, the size of the Board cannot be too large in order to ensure that issues before the Directors can be dealt with in a timely and effective manner. The larger the number of Directors appointed to the Board, the greater the time which must be provided to allow everyone's views to be heard and considered, and the greater the difficulty in harmonizing the differing views which may emerge. It is essential that the size of the Board not act as a detriment to the ability of the Directors to work together as a cohesive group in the best interests of the workers' compensation system as a whole.

There is no magical formula or number which emerges in trying to balance these considerations. Other WCB governing structures across Canada range from 5 to 15 representatives. (Five Boards have 8 or less members, while the remaining six Boards have 10 or more members.) In my opinion, the optimum maximum number of "voting" Directors to be appointed to the BC WCB is 7, and I accordingly make such a recommendation.

2. Board Composition

Each of the three previous reviews of the WCB governance structure recommended that there should be representation from the two key stakeholders – workers and employers. The *Munroe Report* discussed this issue on pages 7 and 8:

> There can be no question that workers and employers have a rightful claim to a predominant position on the Board of Governors. Workers are the intended beneficiaries of the system; for the most part, employers pay for it. Little more need be said to legitimize their claim to predominance. In the language of this

> Committee's terms of reference, workers and employers must be able to "…participate effectively in the initiation, development and approval of [the] policies, programs and procedures" of the workers' compensation system.

The Royal Commission also addressed this issue (on page 35):

> Insofar as the historic compromise was and is an agreement between workers and employers, it is the view of the Commission that those groups have a direct interest in an effective compensation system and should be given every reasonable opportunity to contribute to its success.

I also strongly believe that the governing structure of the workers' compensation system must include worker and employer representatives. As noted by the Royal Commission, our workers' compensation system in BC is premised upon the "historic compromise" – whereby workers gave up their right to sue their employer for work-related disabilities in exchange for an employer funded insurance system predicated on "no-fault" compensation. These two stakeholders – workers and employers – are the foundations upon which the workers' compensation system is built, and they are therefore entitled to have direct input and participation in the system's governance structure.

Where I strongly disagree with the previous three reviews is with each of their recommendations that the worker and employer representatives, combined, should constitute the predominant or majority position on the governing structure. This model was adopted from 1991 to 1995, when the then Board of Governors consisted of 13 voting members, 10 of which represented worker and employer constituencies. It is my opinion (which I believe is shared by many) that this "predominant" representation governing structure was a failure. In effect, the previous Board of Governors structure more closely represented a negotiating table, with both labour and business lobbying the remaining "public interest" representatives for their support.

In my view, a resurrection of this "predominant" representation governing structure in BC will be similarly doomed to failure. Accordingly, it is my recommendation that the new Board of Directors should include worker and employer representatives, but that the combined number of Directors from these two constituencies must be a minority of the overall number of Directors appointed to the governing structure.

Based upon my recommendation that

a. the number of "voting" Directors be appointed to the Board of Directors is 7, and

b. the combined number of Directors representing the worker and employer constituencies must be a minority of the overall number of Directors appointed,

the composition of the "voting" Directors on the new Board of Directors would be as follows:

(i) the Chair of the Board of Directors,

(ii) one worker representative,

(iii) one employer representative, and

(iv) four public interest representatives.

I will return to the appointment process for each of these Director positions in the next section of this discussion.

The President/CEO of the WCB was a non-voting member of the Board of Governors from 1991 to 1995. It is my recommendation that the President/CEO remain a non-voting member of the new Board of Directors. The President/CEO is the senior management position within the WCB, and therefore is responsible for ensuring that the decisions by the Board of Directors are implemented by the administration of the WCB. In order to achieve this objective, the President/CEO must have a thorough understanding of the decisions reached by the Board of Directors. As noted by the Royal Commission on page 37, the President/CEO's membership on the governing body would give him/her "the opportunity to see first-hand what the governors were deciding and why, and to have input into their decisions".

Finally, the Chief Appeal Commissioner of the Appeal Division was also a non-voting member of the Board of Governors from 1991 to 1995. It is my recommendation that the Chair of the new Appeal Tribunal (to be discussed in a later section of this Report) should not be a member of the new Board of Directors. In my opinion, it is essential that both the reality and the perception reflect an independence of the executive function of the workers' compensation system (ie: the Board of Directors) from the judicial function (ie: the Appeal Tribunal). Having the Chair of the new Appeal Tribunal appointed as a non-voting member of the Board of Directors would, in my view, significantly blur the perception, if not also the reality, of independence. Nevertheless, an effective working relationship will need to be developed between the Chair of the new Appeal Tribunal and the Board of Directors of the WCB with respect to matters of common interest and importance to both organizations.

F. The Appointment of the Directors

The current legislation provides the Lieutenant Governor in Council with the authority to appoint the representatives to the Board of Governors (and now to the Panel of Administrators). It is my recommendation that the authority to appoint representatives to the new Board of Directors should similarly reside with the Lieutenant Governor in Council.

There are several characteristics which must be common to all appointments to the Board of Directors.

(i) First, and foremost, the primary responsibility of each Director must be to the workers' compensation system and to all of it stakeholders – not just to the members of the constituency from which the Director was appointed. It is my opinion that this responsibility in effect represents a fiduciary duty on the part of each Director to act in the best interests of the workers' compensation system as a whole. The importance of this fundamental principle cannot be overstated and, accordingly, I recommend that it be specifically enshrined in the legislation.

(ii) The Directors must be selected based upon their particular knowledge, experience and background which it is reasonable to expect will be needed and utilized by the Board of Directors as a whole.

(iii) Directors should be perceived to possess the following attributes – the ability to approach issues with a thoughtful and open-minded attitude; the possession of good judgment; the willingness to devote sufficient time (including preparation time) to fulfill his/her responsibilities as a Director; and the ability to work on a collegial basis with other Directors.

(iv) The Directors should be drawn from the most senior ranks of their organizations or callings. On this point, I strongly agree with the following paragraph from page 11 of the *Munroe Report*:

> It is imperative that the governors be drawn from the most senior ranks of their organizations or callings. Adherence to that recommendation will facilitate the development of consensus, just as a lack of adherence will surely hamper such development. Beyond that, senior appointments will be necessary to give this new structure its initial credibility and momentum.

Finally, it is my opinion that the "per diem" rate paid to persons who are prepared to fulfill the responsibilities of a Director of the WCB must be sufficient to attract the type of candidates described above. I anticipate that this remuneration issue is one which will be addressed on a wider basis by the Administrative Justice Project which is currently being conducted by the Provincial Government.

I will now provide some comments concerning each particular group of representatives on the proposed Board of Directors. The comments which follow are not intended to be reflected in the legislation, but instead are meant to be some guiding factors with respect to how I envision the selection process would work for each particular group of Directors.

1. The Chair

The Chair of the Board of Directors should be perceived by the major stakeholders as being a neutral, credible and competent representative on behalf of the workers' compensation system as a whole. I agree with the following characteristics which the *Munroe Report* identified (on page 12) with respect to the Chair of the Board:

> First of all, the chairman must enjoy the confidence of the labour and management communities and must be adept at forging consensus. Second, he

> or she must have the skills necessary to preside at meetings of the Board of Governors; to ensure the productive operations of that body; to facilitate and monitor the implementation of that body's decisions by the subordinate officers and staff. Third, he or she must be capable of acting as public spokesperson on broad policy matters. Finally, the chairman will have to develop the appropriate relationships with government.

In my opinion, the Government must consult with the Chair of the Board of Directors prior to appointing other Directors to the Board. The Chair is the person who will be responsible for fulfilling the leadership role on the Board of Directors, and for seeking consensus and collegiality amongst the Directors. Accordingly, I believe that those persons appointed as Directors on the Board must be perceived by the Chair as being individuals with whom he/she will be able to effectively work.

2. Worker and Employer Representatives

As previously recommended, there should be one Director appointed as a representative from each of the worker and the employer communities. The appointed Directors must be credible and acceptable to the community which they are intended to reflect. Accordingly, it is essential that the Government engage in meaningful consultation with the appropriate representatives of the worker and employer communities, respectively, before making the applicable appointments. On this point, I fully support the following excerpt from page 23 of the *O'Callaghan/Korbin Report*:

> It is also very important the government pay close attention to the recommendations of the representative groups regarding the appointment of new Governors. Just as the representative groups must appreciate the Governors mandate to act in the best interests of the WCB and all stakeholders so must the government ensure that the nominees to the Board clearly have the support of their representative groups. The government must retain the right to make the final decision but nominations need to be the result of extensive consultation.

The appointed Directors must also have the stature within their respective communities so as to be able to reach decisions which are in the best interests of the workers' compensation system as a whole, without fear or apprehension of recriminations from their community should those decisions not be to the latter's liking. Once again, I support the following statement on page 22 of the *O'Callaghan/Korbin Report*:

> We recognize the challenge Governors face in having to rise above the specific interests of their representative groups in order to act in the best interests of all stakeholders and in the WCB itself. This requires leadership, confidence and courage. It requires the ability to articulate to their representative groups the rationale behind the decisions they make even though, from time to time, their decisions may not be consistent with the views of the representative groups.

The worker and employer representatives are intended to fulfill an important role on the Board of Directors. As I indicated previously, the two primary stakeholders in the workers' compensation system – workers and employers – are entitled to have direct input and participation in the system's governance structure. It is essential that the Board of Directors have an understanding of the impact on, and reaction of, these two primary stakeholders with respect to matters of significance to the system. The worker and employer representatives on the Board will be able to provide direct access to the full Board of the views of their respective communities.

However, I must re-emphasize an essential theme that I have previously raised. The worker and employer representatives on the Board must be committed to acting in the best interests of the workers' compensation system as a whole – and not simply in the best interest of their particular constituencies. Without such a commitment to the system as a whole, the Government should refrain from appointing a particular representative on behalf of either community or, if already appointed, should consider revoking the appointment of the particular Director for failing to meet his/her fiduciary duty to the system.

3. Public Interest Representatives

One of the fundamental purposes of workers' compensation legislation is to provide a fair compensation system for disabled workers. Accordingly, their needs and views should also be understood and represented at the Board of Directors level. However, I believe that the wider perspective of disabled persons, whether a worker or not, can be of greater utility to the Board of Directors. It is therefore my opinion that one of the four public interest Directors should be appointed from a recognized organization which represents the interests of disabled persons generally (as opposed to an organization whose primary focus is with respect to disabled workers – since this would result in an imbalance between the number of worker representatives (2) and employer representatives (1) on the Board of Directors).

The remaining three public interest Directors should be drawn from professional disciplines or callings which are relevant to the operation of the workers' compensation system, and therefore would provide the Board of Directors with direct access to the needed expertise and knowledge in order to meet its statutory responsibilities as the steward of the system. Although the Board of Directors will obviously need to place significant reliance upon the information and opinions provided to it by the WCB administration, it would not be appropriate nor acceptable for the Board of Directors to simply rubber-stamp the views of the WCB's administration. Instead, the Board of Directors must bring its own independent thought and judgment to issues of significance to the system, and therefore must have the expertise and knowledge to know what questions or concerns should be raised.

For example, one of the statutory duties that I will be proposing will require the Board of Directors to act in a financially responsible and accountable manner. In order to meet this duty, one of the public interest representatives on the Board of Directors should be filled by a person with expertise in financial matters (such as an actuary). Other disciplines or callings which, in my view, would assist the Board of Directors in fulfilling its responsibilities would include persons with experience in occupational medicine/community health; investments/money management; benefit plans and administration; workers compensation/occupational health and safety matters; etc.

I wish to raise one final comment with respect to persons who should not be considered as a potential public interest Director. Any person who could reasonably be perceived to be closely associated with either the worker or employer communities should not be appointed as a public interest representative.

G. The Term of Appointment

The term of the Director's appointment must be for a sufficient length of time so as to allow the Directors to become knowledgeable with respect to the operation of the workers' compensation system in British Columbia and to develop a cohesive working relationship amongst themselves. Accordingly, I recommend a term of appointment of three years for each Director, with the exception of the Chair whose term would be for five years in order to provide for greater continuity and stability in this leadership role.

Notwithstanding the above recommendations, I believe an exception must be made with respect to the initial appointments to the new Board of Directors in order to provide for staggered terms so as to ensure continuity amongst a majority of the Directors. Accordingly, with respect to the initial appointments of the worker, employer and public interest Directors, I recommend that three Directors be appointed for 3 year terms, and the remaining three Directors be appointed for 4 year terms. (The Chair would be appointed for a 5 year term.)

Finally, a Director's potential appointment should be restricted to two successive terms (ie: his/her initial term of appointment and one term of reappointment), in order to allow a renewal and revitalization of the perspectives being brought to the Board of Directors as a whole.

H. Revocation of Appointment

I am in general agreement with the following comments found on page 41 of the *Final Report of the Royal Commission*:

> Implicit in the government's authority to appoint a board of governors is its ability to revoke appointments. However, this ability should be limited in its scope in order to provide some security of tenure; the system must be allowed to operate without interference, and the ability to appoint and revoke appointments must not become, or be seen to become, a tool for influencing the activities of the board. If the government deems it necessary to intervene, it always retains the ability to enact legislation, as it did in 1995.
>
> That said, the government should be able to revoke an individual appointment for cause, including a breach of trust associated with the individual's duties. These duties should be stated in legislation, providing a clear understanding of the role and responsibilities of all governors, including:

- The duty to act in good faith;
- The duty to act in the best interests of the workers' compensation system; and
- The duty of confidentiality, requiring the utmost discretion to be used when discussing the affairs of the system or the activities, operations or deliberations of the board of governors, including any discussions with stakeholders represented by the governor.

I am also in agreement that one of the legislated duties should be the duty to avoid conflicts of interest, broadly defined. However, I do not necessarily agree that the best way to define conflict of interest scenarios is to set out detailed provisions in the legislation. The current conflict of interest rules are set out in the Panel of Administrators' Manual. In my opinion, it is sufficient for the legislation to require the new Board of Directors to develop and implement conflict of interest rules which will apply to all Directors.

I also believe that the legislation should require the Board of Directors to act in a financially responsible manner. A similar provision is found in Section 163(1) of the Ontario Workplace Safety and Insurance Act, which reads:

> The board of directors shall act in a financially responsible and accountable manner in exercising its powers and performing its duties.

As noted above, the Royal Commission recommended that the legislation include the "duty of confidentiality". In my opinion, the nature and extent of confidentiality of the discussions of the Board of Directors should be left for the Directors themselves to establish in their own bylaws, as opposed to being enshrined in the legislation. I base my opinion on the following considerations:

(i) The concept of a "representational" Board of Directors is premised on the understanding that the worker and employer representatives will, on occasion, be consulting with their respective communities concerning issues of importance to the workers' compensation system, in order to gauge the impact on, and reaction by, the two key stakeholders to these issues. To place a restrictive duty of confidentiality in the legislation would be inconsistent with this objective.

(ii) Many of the significant issues within the workers' compensation system would have already been brought to the attention of the key stakeholders prior to being considered by the WCB's governing structure. In such circumstances, the duty of confidentiality would not be readily applicable.

(iii) I have no doubt that the Board of Directors will, on occasion, wish to maintain confidentiality with respect to an issue it is considering. However, it is my view that the bylaws of the Board of Directors is the appropriate mechanism to enunciate the nature and extent of the confidentiality to be given to any matter being dealt with by the Board of Directors.

Accordingly, it is my recommendation that the legislation should specify the following statutory duties with which the Directors must comply:

(i) To act in the best interests of the workers' compensation system and to all of its stakeholders;

(ii) To act honestly and in good faith;

(iii) To exercise the care, diligence and skill of a reasonably prudent person;

(iv) To avoid conflicts of interest, as specified in the bylaws of the Board of Directors; and

(v) To act in a financially responsible and accountable manner in exercising its powers and performing its duties.

I. Full-Time vs. Part-Time Appointments

It is my recommendation that the representatives on the Board of Directors should be appointed on a part-time basis (which I envision would be approximately 5 to 8 days per month). There are essentially two reasons for my recommendation:

1. As previously discussed, the Directors should be drawn from the most senior ranks of their organizations or callings. As such, each Director will presumably continue to have other professional or business responsibilities to fulfill. Accordingly, the Director's role on the Board of Directors must be balanced with his/her other responsibilities.

2. The volume of work which the Directors will be required to undertake must be reflective of their role within the system. In particular, it is not the responsibility of the Directors to manage the workers' compensation system – this role lies with the WCB's senior management personnel.

The Royal Commission recommended that some of the Governors should be full-time (ie: one worker, one employer, and one public interest representative, as well as the Chair), while the remainder would be part-time. The rationale for the Royal Commission's recommendation was set out on page 38 of its *Final Report*:

> However, the volume of work likely to be placed before the governing body, and the need to effectively manage the policy function in a system based on administrative adjudication means that some full-time membership is necessary.

I disagree with the Royal Commission's recommendation. Splitting the Directors into "full-time" and "part-time" positions is, in my opinion, creating a "two-tier" system of governance. It is hard to imagine that the full-time Directors would not be perceived, both within and outside the WCB, as having greater involvement and influence in the decision-making process (particularly with respect to policy issues). Such a "two-tier" system would not be a beneficial aspect of the governance structure.

With respect to the Royal Commission's comment concerning the volume of work likely to be placed before the governing body, I agree with the following paragraph on page 31 of the *O'Callaghan/Korbin Report*:

> Governors cannot afford to spend the amount of time that they have historically spent fulfilling their Governor obligations. A serious consequence of such a demanding schedule is that it could become increasingly difficult to attract potential Governors who meet the criteria for membership and who are willing to devote such a significant portion of their time to the WCB. An additional consequence is Governors are likely to become involved in areas which are more appropriately the responsibility of management.

Finally, I do envision that the two workers' compensation Core Reviews will lead to significant changes within the system. In order to effectively implement and manage the change, there may well be a need to have the Chair of the Board of Directors functioning on a more or less full-time basis for the first year or two of his/her appointment. After that initial "start-up" period, the Chair's responsibilities should revert to a part-time role.

J. The Role of the Directors

The overriding role of the Board of Directors is to be the steward of the workers' compensation system in British Columbia. Its role is not to take on the day-to-day operation and management of that system.

In fulfilling its role, the responsibilities of the Board of Directors would include, but not be limited to:

(i) Selection and evaluation of the President/CEO of the WCB;

(ii) Approval of the operating and capital budgets of the WCB;

(iii) Approval of the published policies of the WCB;

(iv) Approval of major programs and expenditures undertaken by the WCB;

(v) Overall responsibility for ensuring the protection of the WCB's assets and investments;

(vi) Setting the strategic direction for the WCB, and evaluating its progress;

(vii) Ensuring the adequate funding of the Accident Fund;

(viii) Monitoring the organizational performance by the WCB, and requiring corrective action to be taken where necessary; and

(ix) Enacting bylaws for the conduct of the business and functions of the Board of Directors, including any bylaws which may be required in the legislation (such as conflict of interest provisions).

It is my recommendation that the above responsibilities of the Board of Directors should be specified in the legislation.

In addition to the above responsibilities as a member of the Board of Directors, the Chair would have additional functions to fulfill, including:

(i) Preside at meetings of the Board of Directors;

(ii) Provide the leadership role with respect to the responsibilities to be undertaken by the Board of Directors;

(iii) Facilitate consensus and team building amongst the Directors;

(iv) Ensure an effective orientation is provided to all new members on the Board of Directors;

(v) Be the key contact with respect to interaction between the WCB and Government; and

(vi) Fulfill a public interest role by acting as the WCB spokesperson on matters of major interest or importance to the workers' compensation system in British Columbia.

Finally, the Chair must have the authority to designate one of the four public interest Directors to act in the Chair's place during his/her temporary absence, and while so acting the designated Director would have the power and authority of the Chair. In the event that the Chair is absent and no such designation has been made, the remaining Directors would have the authority to determine which of the four public interest Directors would act in the Chair's place during his/her absence.

K. The Role of Government

The public interest, with respect to ensuring that there is an effective, efficient, stable and fair workers' compensation system in British Columbia, is significant. Accordingly, there can be no doubt that the Provincial Government must play a role in the overall governance of the workers' compensation system in British Columbia. However, it is my opinion that the role to be played by Government does not extend to direct representation on the Board of Directors at the WCB.

With respect to the Government's role within the workers' compensation system in British Columbia, I adopt the following paragraphs on page 33 of the *Final Report* of the Royal Commission:

This commission is of the view that government's influence should be limited primarily to those matters that only government can and should affect. At its most fundamental level this would include establishing the enabling legislation, appointing governors, and holding the system accountable for achieving its objectives in a manner consistent with government's broader public-policy goals.

The commission expects that this consistency would be achieved by amending the appropriate provincial legislation, thereby redefining the boundaries within which the Workers' Compensation Board may freely operate, rather than by government influence at the governance level, which could cloud control and accountability.

L. Quorum

It is my recommendation that a quorum for conducting the business of the Board of Directors should be set at a majority of the voting Directors who have been appointed – ie: a quorum of four Directors would be needed when the full seven person Board of Directors has been appointed. A decision of the majority of the Directors constituting the quorum would be the decision of the Board of Directors.

The current Panel of Administrators' Manual places significant emphasis on the ability of all members of the Panel to achieve consensus with respect to any matter which is before it. In particular, I refer to Chapter 2 of the Manual (entitled "Panel of Administrators' Procedural Bylaw"), Section 5 (entitled "Consensus and Decision-Making by the Administrators"). Sections 5.1 and 5.2 read as follows:

> 5.1 How matters are to be decided – The goal of the Administrators is to achieve consensus on all substantive matters associated with the mandate of the Panel of Administrators.
>
> 5.2 Meaning of Consensus – Consensus means that all Administrators have reached a general agreement on an issue or set of issues before them. General agreement means that there is no substantive disagreement and that there will be no public expression of dissent by any Administrator.

Pursuant to Section 5.5(c), if consensus among all of the Administrators cannot be reached, then the Administrators may vote to have the issue decided by the Chair. However, it is my understanding if no such vote authorizes the Chair to decide the matter, then the issue remains unresolved.

Although I appreciate the importance of seeking consensus among the Directors, I place greater importance on the new Board of Directors being able to act in an effective and timely manner. With a Board comprised of 7 voting Directors, I have no doubt that occasions will arise when broad consensus among all of the Directors will not be achievable on a given issue. In such circumstances, it is my expectation that a vote would be held among the attending Directors, and that the majority of the votes would constitute the decision of the Board of Directors. It is also my view that the Chair of the

Board of Directors would take part in the voting process in the same manner as the other voting Directors.

As I stated above, I do appreciate the value of reaching a consensus when such an objective can be met. In order to provide a reasonable opportunity for consensus to be built, it is my recommendation that the authority to call a vote with respect to a particular issue should be left to the discretion of the Chair. However, as I previously indicated, the Chair must be prepared to exercise his/her authority in those circumstances when an issue must be finally resolved, and no consensus has been achieved.

Chapter 3: APPELLATE STRUCTURE AND RELATED TOPICS

A. Overview

The *Workers Compensation Act* (the "*Act*") and the published policies of the WCB set out various appeal processes with respect to claims, prevention/occupational health and safety, and classification/assessment matters. A brief overview of each of these processes is set out below.

1. Claims Issues

With respect to claims issues, the *Act* currently contains three formal levels of appeal – the Workers' Compensation Review Board (the "Review Board"), the Appeal Division of the Workers' Compensation Board (the "Appeal Division"), and the Medical Review Panel (the "MRP").

The Review Board is the first formal level of appeal for most claims issues. Pursuant to Section 90(1) of the *Act*, the Review Board's jurisdiction is limited to those decisions made by the WCB "with respect to a worker". Accordingly, the Review Board has no jurisdiction to consider appeals on "employer issues" (such as assessment appeals, or administrative penalty appeals under Part 3 of the *Act*). Appeals to the Review Board are considered on a substitutional basis, whereby the Review Board can substitute its judgment for the decision of the WCB Officer which is under appeal.

The Review Board operates externally from the WCB and reports to the Ministry of Skills Development and Labour. Appointments of the Chair, Vice-Chair and Members of the Review Board are made by the Lieutenant Governor in Council through Orders in Council. However, the operation of the Review Board is funded through the WCB's Accident Fund.

The Appeal Division was created in June 1991, and is the final level of appeal for non-medical claims issues. The Appeal Division operates as an internal appeal tribunal within the WCB (ie: it is actually part of the WCB), although its decision-making authority is intended to be independent from the rest of the WCB. The Appeal Division is headed by the Chief Appeal Commissioner, who is appointed by the Governors of the WCB (whose responsibilities are current being performed by the Panel of Administrators). The Chief Appeal Commissioner is responsible for the appointment of all the Appeal Commissioners. Appeals to the Appeal Division with respect to claims issues (pursuant to Section 91(1) of the *Act*) are dealt with on a substitutional basis.

Section 58 of the *Act* establishes the MRP to determine disputes arising from medical decisions made by the WCB, the Review Board or the Appeal Division. A Certificate rendered by the MRP is conclusive and binding on the WCB and the interested parties.

An appeal to the MRP can be brought by the affected worker or employer from any decision-making level within the workers' compensation system, provided that the appeal is commenced within 90 days of the medical decision being made. In practice, the majority of appeals to the MRP are brought by workers from medical decisions rendered by the Appeal Division, since this provides the worker with the opportunity to initially attempt to reverse the disputed medical finding at the Review Board and Appeal Division levels.

Pursuant to Section 63 of the *Act*, a dependant of a deceased worker is entitled to have a Medical Review Panel inquire into and determine the cause of death of the worker if the dependant is aggrieved by a decision of the WCB (including the Appeal Division) or a finding of the Review Board concerning the cause of death. (Section 63 does not permit an employer to request an inquiry by a Medical Review Panel into the cause of death of one of its workers.) Unlike Section 58, there is no time limit specified in the *Act* for a dependant to bring an appeal to the MRP pursuant to Section 63. Once again, the MRP's Certificate pursuant to Section 63 is conclusive and binding on the WCB and the interested parties.

2. Prevention Issues

There are several different appeal processes set out in the *Act* depending on the type of prevention issue which is under consideration.

Pursuant to Section 73(1), if the WCB considers that a worker's injury, death or disablement from an occupational disease was due substantially to:

(i) the gross negligence of an employer;

(ii) the failure of an employer to adopt reasonable means for the prevention of injuries, deaths or occupational disease, or

(iii) the failure of an employer to comply with the orders or directions of the WCB, or with the Regulations made under Part 3 of the *Act*,

then the WCB may levy and collect from that employer as a contribution to the Accident Fund all or part of the amount of compensation payable in respect of the injury, death or occupational disease, up to a specified maximum amount. An appeal by the employer from such a levy would be brought to the Appeal Division pursuant to Section 96(6). In such circumstances, the employer must establish one of the following grounds of appeal to be successful – an error of law, an error of fact or a contravention of published policy.

Part 3 of the *Act* is entitled "Occupational Health and Safety". Division 13 of Part 3 provides that the following occupational health and safety decisions are "reviewable" by a Reviewing Officer:

(i) any Order made by a WCB Officer, with the exception of an Order imposing an administrative penalty,

(ii) the refusal by a WCB Officer to make an Order that would otherwise be reviewable under point (i) above,

(iii) the cancellation by a WCB Officer of an Order that is reviewable under point (i) above, and

(iv) a determination under Section 153(1) of the *Act* respecting discriminatory action or failure to pay wages.

This "review" process is an internal one, since the Reviewing Officers are designated and employed by the WCB. However, Section 202(4) of the *Act* provides that the Reviewing Officer in a specific case "must not be a person who is the direct supervisor of the officer who made the decision under review". Pursuant to Section 206(1), the Reviewing Officer has the discretion to "confirm, vary or cancel the decision under review or substitute his or her own decision for the decision under review".

Certain of the decisions made by the Reviewing Officer can be appealed to the Appeal Division pursuant to Section 207 of the *Act*. These appealable decisions are:

(i) a determination under Section 153 (discriminatory action or failure to pay wages), including a decision respecting the refusal to make or the cancellation of an Order under that Section, and

(ii) a determination in relation to an Order under Section 195 (dealing with the suspension or cancellation of a Certificate issued under Part 3 of the *Act* or the Regulations).

Any other determination made by the Reviewing Officer is "final and conclusive" (pursuant to Section 206(4)), subject to the WCB's general authority to "reopen, rehear and redetermine" any matter within its jurisdiction under Part 3 of the *Act* (pursuant to Section 113(2)).

Finally, any decision made by the WCB concerning an administrative penalty can be appealed directly to the Appeal Division pursuant to Section 207(a). In contrast to an appeal to the Appeal Division pursuant to Section 96(6), there are no grounds of appeal which must be established for any appeal brought to the Appeal Division under Part 3 of the *Act*.

3. Assessment Issues

Policy No. 10:40:00 of the WCB's Assessment Policy Manual provides for the following internal review of any decisions made by the Assessment Department:

> If an employer believes that an Assessment Department decision is incorrect, a request for a review of the decision may be made, in writing, to an Assessment Manager, and if the employer is still not satisfied, to the Director of the Assessment Department or a person assigned this function by the Director.

The above "review" process is not mandatory, and the employer is entitled to appeal any decision of the Assessment Department directly to the Appeal Division pursuant to either Section 96(6) or 96(6.1) of the *Act*. In any such appeal to the Appeal Division, the employer must establish that the disputed decision constituted an error of law, an error of fact or a contravention of published policy.

B. The Need for Reform

In my opinion, there is an overwhelming need for the current appeal processes and structures within the workers' compensation system to be reformed. There are several reasons on which I base my opinion.

First, and foremost, is the complexity associated with the existing processes and structures. Depending on the issues in dispute, the Act (and, to a lesser degree, the published policies of the WCB) specify different review/appeal processes to be followed, with differing time frames, standards of review and levels of appeal. In my opinion, a much simpler appellate process must be established to deal with all disputed issues within the workers' compensation system in a fair, effective and timely manner.

Second, each level of the current appeal system, with respect to claims issues, involves varying time frames, some of which can be unduly lengthy. It would not be unusual for a claims issue, which is appealed through all three levels of appeal, to take 3 to 5 years (or more) to complete. In my opinion, such lengthy proceedings are unreasonable and unfair for the worker, his/her family and the employer.

Third, the multi-level appeal process for claims issues has resulted in several examples where the Review Board and the Appeal Division have rendered inconsistent decisions on issues of substantial importance. In my opinion, enhanced consistency and predictability of decisions made within the workers' compensation system must be given greater priority.

Fourth, the existing multiple levels of appeal on claims issues foster a lack of finality with respect to a worker's claim. There are many examples where, after going through one or more levels of appeal, a worker's claim is referred back to the WCB for further adjudication – which then leads to the potential of further appeals. This process has been referred to as the "treadmill" effect.

Fifth, although I appreciate the medical expertise brought to bear on a medical issue by a Medical Review Panel, there are concerns associated with making the MRP's decision final and binding. For example, there have been occasions when the MRP did not accept or apply the relevant published policies of the WCB to the case at hand. Furthermore, concerns have arisen with respect to the MRP basing its medical decision on new findings of non-medical facts made by the MRP following a process where only the worker was present.

Finally, the existence of three separate appellate structures results, in my opinion, in administrative and financial inefficiencies.

The Royal Commission addressed the topic of "Compensation and Assessment Appeals" in Volume I, Chapter 9 of its *Final Report*. On Page 18, the Royal Commission summarized the concerns which workers and employers had expressed with respect to the appellate process for claims issues:

> Worker and employer submissions to the royal commission agree that the current appeal system is too slow and the delays cause claimants emotional and financial hardship. In addition, they agree that the apparent adversarial nature of the board, the lack of information provided to employees and employers, the complexity of the process, the apparent administrative inefficiency, and inconsistency and delay in decision-making contribute to backlogs and delays in the process.

On Page 20, the Royal Commission noted that "multiple levels of appeal create an unnecessary multiplication of effort". On page 27, the Royal Commission expressed the following view:

> The commission is of the view that fewer appeal levels would reduce jurisdictional disputes, enhance the speed and consistency of decision-making, and eliminate administrative duplication. That in itself would justify changing the current system.

Based upon a consideration of all the concerns set out above, it is my recommendation that the following appellate structure be adopted for the determination of all adjudicative issues in dispute within the workers' compensation system:

(i) an initial "internal" review conducted by the WCB, followed by

(ii) an appeal to a tribunal which is "external" to the WCB.

I will now elaborate upon the significant characteristics which I envision should be part of the "internal review" and "external appeal" processes.

C. Internal Review

1. General Comments

The internal review process that I envision would be premised upon the following general principles:

(i) The overriding intent is to establish a simplified and flexible process for the WCB to conduct an internal review of a disputed determination in a timely manner.

(ii) The internal review process would become an essential component of the WCB's overall strategy to develop and maintain quality adjudication by initial decision-makers within the WCB.

(iii) The same internal review process would apply to all determinations made by WCB Officers, regardless as to whether the matter involved a claims, occupational health and safety, or assessment issue.

(iv) The internal reviews would be conducted by Review Managers who are excluded from the bargaining unit represented by the Compensation Employees Union, and who operate within the WCB independently from the various Divisions from which the disputed determination may originate.

(v) Subject to several specified exceptions, the Review Managers would have substitutional authority over the decision in dispute.

(vi) The internal review process must be premised upon effective and timely communication between the Review Manager assigned to the matter and the parties involved in the review.

(vii) A major objective of the internal review process is to enhance consistency and predictability within the WCB decision-making process with respect to issues of significance to the workers' compensation system.

(viii) Being internal to the WCB means that there will be the opportunity for the establishment of a timely information loop between the internal review process and the WCB senior management/Board of Directors.

2. What can be the Subject of an Internal Review?

Any adjudicative decision made by an Officer of the WCB which affects

(i) a worker covered by the *Act*, or

(ii) in the case of a deceased worker, his/her dependants covered by the *Act*, or

(iii) an employer covered by the *Act*, or

(iv) any other person who may be the focus of a specific entitlement or obligation under the *Act*,

could be the subject matter of an application for internal review. (For the purposes of this Report, an "adjudicative decision" is not intended to include a procedural or administrative decision made by the WCB Officer acting within the authority provided to him/her by the WCB.) This internal review process would apply equally to an adjudicative decision rendered by a WCB Officer with respect to a claims, prevention/occupational health and safety, or assessment/classification issue.

The subject matter of the internal review should not be limited to what the initial decision-maker actually dealt with in the four corners of the decision letter. Rather, the review would encompass any issue which the Review Manager believes should have reasonably been dealt with by the initial decision-maker in his/her letter. My reasoning for this broader scope is to avoid the delay and frustration which will often arise when the matter is referred back to the initial decision-maker to determine the additional issue(s), which could then become the subject of a further application for internal review.

3. How the Internal Review process should be structured.

In order to meet the expected objectives from the internal review process, it is my strongly held opinion that the Review Managers employed by the WCB must be excluded from the bargaining unit represented by the Compensation Employees Union. In my opinion, there is an inherent conflict of interest when one member in the bargaining unit is required to review, on a substitutional basis, a decision rendered by another member in the unit. This conflict would be enhanced in those circumstances when the Review Manager's decision is used by the WCB to address any quality adjudication issues which may arise with respect to the initial decision-maker.

Furthermore, I believe there is a perception of unfairness and bias when a party's appeal is considered by a person who is a member in the same bargaining unit as is the initial decision-maker. For example, employers who were the subject of a proposed penalty assessment for an alleged violation of the OH&S Regulations often appealed to the Variance & Sanction Review Section of the WCB's Prevention Division. In such cases, the WCB Officer hearing the employer's appeal was in the same bargaining unit, and worked in the same operating Division of the WCB, as was the initial decision-maker. In my opinion, it is essential that such perceptions of unfairness and bias do not similarly attach to the proposed internal review process – or else it will simply turn into a time-consuming stepping stone for further appeals to the external Appeal Tribunal.

I note that "exclusion" provisions already exist in Section 86(7) of the *Act* (with respect to the Chief Appeal Commissioner and other Appeal Commissioners appointed to the Appeal Division) and Section 93(5) (with respect to the Chair, Vice Chairs and Members appointed to the Review Board). It is my recommendation that a similar provision be inserted into the legislation for the Review Managers employed by the WCB.

I also recommend that the internal review process be operated separately from the Compensation Services, Prevention and Assessment Divisions of the WCB. The Review Managers will be required to review adjudicative decisions arising from each of these Divisions, and they must not be perceived to be affiliated with, or accountable to, any of these Divisions. To do otherwise would, in my opinion, cloud the perception of independence and impartiality which the Review Managers will require if they are to effectively fulfill their responsibilities. The greater the "cloudiness" of the Review Manager's independence and impartiality, the more likely that further appeals will be brought by dissatisfied stakeholders to the external Appeal Tribunal.

Finally, I recommend that the WCB's internal review division be headed by an individual at the Director's level. The Director would primarily be responsible for the management and administration of the internal review process. However, the Director would also adjudicate internal review applications when he/she felt it would be appropriate to do so.

4. The focus on Quality Adjudication

A primary concern raised by representatives for disabled workers, labour and employers focused on their perceived general lack of quality adjudication by initial decision-makers within the WCB. Although the issue of improving the quality of adjudication by initial decision-makers within the WCB is one which more directly falls within the Terms of Reference for the Core Review of the WCB's Service Delivery, I do envision the proposed internal review process as playing an essential role in the overall quality assurance program which must be adopted by the WCB.

In particular, the proposed internal review process would contribute to the overall success of the WCB's quality assurance program in the following manner:

(i) The internal review process would act as a funnel, with respect to all disputed decisions emanating from the WCB, between the initial level of adjudication and the final level of appeal before the external Appeal Tribunal. Such a funneling process would allow the WCB to achieve a higher degree of consistency and predictability with respect to similar issues which are determined by a multiplicity of initial decision-makers within the WCB. Consistency and predictability are essential features of quality adjudication – ie: similar cases should receive similar treatment from the WCB's adjudication process.

(ii) The proposed internal review process would entail a mandatory review of all disputed decisions arising from the initial level of adjudication within the WCB. There are several important aspects of this mandatory process, from a quality assurance perspective.

First, the internal review process will have the ability to identify recurring problem areas within the WCB's first level of adjudication. The Review Managers involved in the WCB's internal review process would have direct access to the relevant information, and would have "hands on" experience with each disputed decision. Accordingly, the WCB would not have to rely upon a third party's view of where any quality adjudication concerns may lie within the WCB.

Second, since the internal review process is "internal" to the WCB itself, the Review Managers and the Director can interact directly with the appropriate management representatives in the WCB's Operating Divisions with respect to any identified quality adjudication concerns.

Third, being internal to the WCB provides the opportunity for the establishment of a timely information loop between the internal review process and the WCB's senior management and/or Board of Directors. Having such ready access to centralized information in regard to areas of concern within the workers' compensation system, such as the identification of incomplete or inconsistent published policies with respect to a particular issue, would allow the senior management/Board of Directors to address the concern in a timely manner.

This, in turn, would hopefully result in a reduction of the number of appeals *brought within the workers' compensation* system which involve the particular area of concern.

(iii) The internal review process would have the statutory authority to remedy any problems it may identify in regard to the particular decision before it. It makes little sense to have the WCB adopt a quality assurance program which identifies any problems and errors arising from the WCB's initial level of adjudication, but which has no ability to rectify those problems/errors. If the internal review process cannot provide an effective remedy, the affected party will be forced to proceed to the external Appeal Tribunal to obtain the required relief. This scenario would result in two significant negative impacts for the workers' compensation system in BC.

First, there would be no effective mechanism available to the WCB to correct any identified problems/errors before the matter leaves the confines of the WCB. Accordingly, there would be little ability for the WCB to take any appropriate adjudicative steps to effectively reduce the volume of appeals which would be brought to the external Appeal Tribunal.

Second, the credibility of the WCB would be detrimentally impacted. To leave it to the external Appeal Tribunal to rectify any identified errors made by the initial decision-makers within the WCB will result in a heightened awareness of the errors made by the WCB; of the WCB's inability to correct its own errors; and of the increased importance of the external Appeal Tribunal as being the watchdog over the WCB. In other words, I perceive that the Appeal Tribunal's credibility would increase at the expense of the WCB's credibility.

(iv) Another important aspect of quality adjudication is the timeliness of decision making. With respect to the internal review process, this means the ability of the WCB to identify and correct its own errors in a timely manner. As will be discussed in a later part of this section, I have proposed that the *Act* contain a specified time frame, commencing from the date on which an application for review is brought, within which the internal review process must render its decision.

5. How the Internal Review process should be conducted

As previously stated, I believe the overriding intent of the internal review should be the establishment of a simplified and flexible process which will result in a determination being rendered in a timely manner. In order to achieve this objective, I envision the following parameters generally applying to the internal review process.

(i) The internal review should be conducted by one Review Manager.

(ii) The internal review process would be an "inquiry based" model of adjudication – not "adversarial based". The "inquiry based" model allows the Review Manager to seek out the information which is required to ensure a proper determination is reached, and is generally more informal and flexible than an "adversarial based" model.

(iii) The Review Manager must have the procedural flexibility to determine the application before him/her in a timely manner. The formal trappings of law associated with a "quasi-judicial" proceeding should not be applicable to the internal review process. The focus of the Review Manager would be on "corrective justice" – ie: ensuring that appropriate remedial action is taken when required to rectify any identified error made at the initial decision-making level within the WCB. Any "natural justice" concern that a party of interest may have, with respect to the procedural fairness of the internal review proceedings, can be adequately dealt with, if necessary, at any subsequent appeal which may be brought to the external Appeal Tribunal.

(iv) There must be effective and timely communication between the Review Manager assigned to the matter and the parties of interest involved in the review. Matters to be discussed would include the identification of the issues which will be addressed (and those issues which will not) by the Review Manager; whether any additional evidence will be required; and an elaboration of how the internal review process will be conducted (ie: whether the internal review will proceed by way of written submission only, or whether an informal oral hearing will be held; the time frames within which the various steps of the internal review process will be taken, etc.)

(v) I do not envision that Review Managers will conduct formal oral hearings. However, the Review Manager must have the discretion to conduct any investigation he/she believes is appropriate in order to render a determination with respect to the issues before him/her. Such discretion would certainly include the holding of an "informal" oral hearing with the parties of interest in those circumstances where the Review Manager believes it appropriate to do so in order to interview witnesses or assess issues where credibility may be involved.

(vi) Since Review Managers will often be required to consider complex medical issues, they may face a need to obtain timely assistance from medical experts. In order to maintain the perception of independence between the internal review process and the operating Divisions of the WCB, it is my belief that the Review Manager must have access to medical assistance which is independent from the medical assistance provided to the initial decision-makers within the WCB. This objective can be accomplished by either having Medical Advisors assigned solely to the internal review process, and/or obtaining medical assistance from outside consultants.

(vii) Generally speaking, I believe that the existing provisions set out in Sections 205(1) and (3) of the *Act* (concerning the review process for the purposes of Part 3) would be equally applicable to the Review Managers involved in the proposed internal review process.

6. Standard of Review

A significant issue to be resolved is whether the internal review process should be conducted on a substitutional basis or on a more limited supervisory basis. At the outset, I will elaborate upon the meaning I intend to attribute to each of these terms.

However, I first want to comment upon a term which I will not be using in this discussion – a "de novo" hearing. In such a hearing, the Review Manager would render his/her decision without regard to the determination reached by the previous decision-maker. In other words, the Review Manager would be conducting the internal review as if he/she was considering the matter in the first instance. The Review Manager would not be required to give any consideration to the findings of fact or conclusions reached by the previous decision-maker, and in essence would assume the role of the original decision-maker.

I do not envision the internal review process (nor the external Appeal Tribunal process) being conducted on a "de novo" basis. To the contrary, regard must be had to the findings made at the previous decision-making level.

Under the "substitutional" standard of review (which is also referred to as an appeal by way of a rehearing), the initial function of the appellate tribunal is to determine whether the previous decision was wrong. In reaching this determination, the appellate tribunal will consider both the evidence and findings originating from the previous decision-maker, as well as any new evidence and submissions which may be provided to the tribunal. Once a determination is reached that the previous decision was wrong, the appellate tribunal has the authority to substitute its own decision on the merits of the case.

Under the "supervisory" approach, the role of the appellate tribunal is to ensure that the previous decision was made in accordance with the proper law and policy. Generally speaking, the parties to the appeal are not permitted to submit new evidence to the appellate tribunal. The supervisory approach is intended to provide greater deference to the findings of the previous decision-maker.

Subject to the exceptions discussed below, it is my recommendation that the internal review process should be conducted on a substitutional basis. In other words, the Review Manager should first determine whether the decision of the initial decision-maker was wrong (based upon the Review Manager's consideration of all the evidence and submissions before him/her). If no error can be identified, then there would be no reason for the Review Manager to substitute his/her judgment on the merits of the case. Instead, the decision of the initial decision-maker would be confirmed.

If the Review Manager did find an error in the previous decision, then he/she would be entitled to substitute his/her decision based upon the merits of the case. In other words, the Review Manager would have the authority to vary or cancel the decision which is the subject matter of the internal review.

I base my recommendation (that the internal review process should be conducted on the broad substitutional standard of review, as opposed to the more limited supervisory approach) on the following factors:

(i) Since the BC workers' compensation system is based on an "inquiry" model of adjudication, workers and employers are not actively encouraged to seek representation prior to the initial decision-maker rendering his/her decision. However, the workers' compensation system is quite complex and many of the unrepresented workers and employers are often unsophisticated with respect to the manner in which the system works. Accordingly, it is often the case that the worker and/or employer are unaware of the full extent of the information which may be required to support their position until after the initial decision is rendered.

To limit subsequent appellate levels to a supervisory role in these circumstances would, in my opinion, create an unfairness for the unrepresented and unsophisticated workers and employers who simply do not have the knowledge or resources to ensure that their interests have been fully and properly adjudicated by the initial WCB decision-maker.

(ii) With respect to claims issues, the primary focus is on the entitlement of the worker (or his/her dependants) to compensation benefits under the *Act*. In my opinion, the worker (or his/her dependants) should be afforded the greatest opportunity to ensure that any entitlement which he/she may have under the *Act* has been awarded to him/her.

(iii) Flowing from the above points, I believe that an appellant must be provided the opportunity to submit any new information, such as a medical report from a specialist, which is relevant to the issue in dispute. Such new evidence would generally not be admissible in the case of a tribunal exercising purely supervisory authority over the previous decision-maker.

(iv) As will be elaborated upon in the section of this Report entitled "Reconsiderations/Reopenings", I will be recommending significant restrictions to the ability for a worker or an employer to seek a retroactive "reconsideration" of a previous decision rendered by the WCB/Appeal system. It is therefore imperative that the WCB and the appellate system are provided the widest latitude to ensure that the "correct" decision is made before the matter has been finalized.

Since the internal review would generally be conducted on a substitutional basis, the parties of interest would be entitled to present new evidence to the Review Manager which had not been brought to the attention of the previous decision-maker. In these circumstances, a question arises as to whether the Review Manager should refer new evidence, which is substantial and material to the decision under review, back to the initial decision-maker for his/her further consideration and determination.

In my opinion, the answer to this question is no. The referral of the matter back to the initial decision-maker would often result in a further delay to the overall completion of the adjudication process with respect to the issue in question. In those cases where either the appellant or the respondent is unhappy with the "new" decision of the initial decision-maker, another application for an internal review would be brought. Since the internal review process will be conducted on a substitutional basis, the Review Manager will be in at least as good a position as the initial decision-maker to consider the new evidence and to make a determination.

As noted above, I do perceive several exceptions to my recommendation that the internal review process should be conducted on a substitutional basis. These exceptions are:

(i) Decisions by Officers in the Prevention Division to render an Order, or to refuse to render such an Order, pursuant to Part 3 of the *Act*. This exception is based on the overall number of such Orders rendered by the Prevention Division. To allow substitutional authority over such Orders could significantly bog down the efficient and timely operation of the internal review process.

However, any Orders which are relied upon by the WCB to impose an administrative penalty or to initiate a prosecution, or any Orders to cancel or suspend a certificate made pursuant to Section 195 of the Act, would be subject to the broader substitutional standard of review by the internal review process.

(ii) Decisions rendered by the Assessment Department concerning the Rate Group or Industry Subsector/Sector to which an industry is assigned for assessment purposes. Rate Groups must be large enough to provide an adequate spread of risk and some stability to the premium rate charged to employers within that Rate Group. In my opinion, it is essential that decisions concerning the assignment of an industry to a Rate Group (or a Subsector/Sector) are not subject to a substitutional review by way of appeal, the result of which may have a significant impact on the continued financial viability of the Rate Group.

However, if an employer asserts that an incorrect classification unit was assigned to its particular industrial activities, then the employer would be entitled to have the broader substitutional review conducted of that much more limited issue.

(iii) Any vocational rehabilitation ("VR") decisions made by the WCB concerning the eligibility, nature and extent of VR services provided to disabled workers (pursuant to Section 16(1) of the *Act*) or to surviving dependants of a deceased worker (pursuant to Sections 16(2) and (3)). (The rationale for this limited scope of review, with respect to any VR decision made by the WCB, is elaborated upon in a later section of this Report entitled "Vocational Rehabilitation".)

For the purpose of clarification, any "deeming" decisions, which relate to the disabled worker's level of entitlement to a loss of earnings pension under Section 23(3) of the *Act*, would be subject to the broader substitutional standard of review by the internal review process (and, upon further appeal, by the external Appeal Tribunal).

(iv) Decisions applying the indicated percentage of impairment of earnings capacity on the Permanent Disability Evaluation Schedule ("PDES") or on the permanent impairment rating schedule for chronic pain (to be developed by the WCB as recommended in the "Pensions" section of this Report), provided that the specified percentage of impairment has either no range, or has a range which does not exceed 5%. (For the purpose of clarification, when the range of percentage of impairment exceeds 5%, then the decision with respect to the actual percentage to be applied to the permanent impairment of the individual worker would be subject to the broader substitutional standard of review by the internal review process and, upon further appeal, by the external Appeal Tribunal.)

The rationale for this limited scope of review, with respect to the application of the percentages of impairment specified on the PDES or on the permanent impairment rating schedule for chronic pain, is elaborated upon in a later section of this Report entitled "Pensions".

(v) Decisions whether or not the WCB should commute a pension or survivor benefit award. Section 35(2) of the *Act* expressly states that the WCB "may in its discretion" commute all or part of the periodic payments due or payable to the worker. The worker's entitlement to the compensation benefits is not at issue in commutation decisions made by the WCB – only the manner in which the entitlement will be paid to the worker is affected.

(vi) Any decisions made by the WCB concerning the eligibility, nature and extent of any allowances or similar expenditures which the WCB has the discretion to provide, including

(a) clothing allowances,

(b) personal care expenses or allowances,

(c) independence and home maintenance allowances,

(d) transportation allowances,

(e) subsistence allowances, and/or

(f) homemakers' services.

With respect to an appeal involving any of the above issues, the internal review process should be conducted on a more limited basis. In other words, greater deference should be given by the Review Managers to the determinations made by the initial decision-makers in regard to the above issues. Accordingly, the grounds of review, upon which such supervisory authority should be based, are:

(i) error of fact which had a substantial and material impact on the decision reached by the initial decision-maker, or

(ii) error of law, or

(iii) contravention of a published policy of the Board of Directors.

7. Time Limits

It is my recommendation that the legislation should specify time limits for the following events:

(i) the commencement of the application for internal review from an adjudicative decision made by the WCB; and

(ii) the rendering of a decision by the Review Manager.

(a) The Commencement of the Application

With respect to the commencement of the application for internal review, it is noted that the current legislation provides a 90 day timeframe for a claims decision to be appealed to the Review Board (Section 90(1)), and a 30 day timeframe for a subsequent appeal to be brought from a Review Board finding to the Appeal Division (Section 91(1)). Some have argued that 90 days is a longer period than is reasonably needed for the affected party to determine if a review is warranted, and others have asserted that 30 days is too short.

In my opinion, 90 days should be a sufficient period of time for a party, who is dissatisfied with a decision of the WCB, to consider the merits and implications of the initial decision, to seek advice from others where appropriate, and to make a determination whether or not to proceed to an internal review. In order to ensure that an aggrieved party is made aware of the existence of this time limit, I recommend that the written decision letter rendered by the initial decision-maker clearly indicate any right which may exist with respect to an application for internal review, including reference to the 90 day time limit within which such an application must be commenced.

Accordingly, it is my recommendation that an application for internal review must be brought within 90 days from the day the decision in dispute was communicated, in writing, to the affected party. With respect to the information required in order to apply for an internal review, I believe the criteria set out in Section 201(2) of the *Act* (with respect to a review under Part 3) are appropriate – ie: the application must:

(i) be made in writing or in another manner acceptable to the WCB,

(ii) identify the decision for which a review is requested, and

(iii) state the basis on which the application for review is made and the outcome requested.

Both Sections 90(1) and 91(1) provide the Review Board and the Appeal Division, respectively, with the discretion to extend the time frame within which an appeal must have been commenced. Other "appeal" provisions in the *Act* set out a mandatory time frame without any mention of the potential for extension (such as an appeal to the Medical Review Panel pursuant to Sections 58(3) and (4), an application for a review under Section 201 of the *Act*, or an appeal to the Appeal Division pursuant to Section 209 under Part 3 of the *Act*).

Should there be some discretion to grant an extension of time with respect to an application for internal review? In my opinion, the answer is yes in order to avoid an injustice in those circumstances where the applicant has missed the mandatory time limit for commencing the application for internal review . However, it is also my belief that the granting of such extensions should be the exception in order to provide some finality to the issue. Accordingly, I have added the requirement that an extension should only be granted "to avoid an injustice", in order to establish a higher standard for the granting of an extension than is currently found in Sections 90(1) and 91(1) of the *Act*.

It is therefore my recommendation that the Director of the internal review division, or his/her delegate, should have the discretion to grant an extension in order to avoid an injustice where the appealing party has missed the mandatory time limit for commencing the application for internal review.

Finally, once an application for internal review is submitted within the 90 day time frame (or the extended time frame if an extension is granted), it is my recommendation that the WCB be required to provide the disclosure documentation from its files to the applicant, as well as to any interested party who will have the right to participate as a respondent. A letter should accompany the disclosure material to the respondent, advising the party of its right to participate in the internal review process, and providing the respondent with a specified period of time to notify the Review Manager that it does intend to participate.

(b) The Rendering of the Decision

The current legislation sets out two circumstances in which time frames are specified for a decision to be rendered:

(i) Section 91(3) requires the Appeal Division to render its decision, with respect to an appeal from a Review Board finding, within 90 days of the date on which the appeal was commenced (with the potential for an extension specified in subparagraph (c)); and

(ii) Section 202(3) requires the Reviewing Officer to render his/her decision within 60 days after the application for the review is received (unless the complexity of the matter makes this impracticable).

It is my recommendation that a time frame be specified in the *Act* within which the Reviewing Officer must make his/her decision. However, since the internal review process will apply to all initial adjudicative decisions rendered by any Division of the WCB, this time frame must be long enough to allow the potential volume of applications to be handled by a reasonable number of Review Managers. Accordingly, it is my recommendation that the decision must be rendered by the Review Manager within 150 days of the commencement of the application for an internal review. The actual "commencement" date should start on the day that the disclosure documentation is provided to the applicant.

It is my further recommendation that the Director of the internal review division, or his/her delegate, should have the discretion to extend the 150 day period in which the Review Manager must render his/her decision in the following circumstances:

(1) Where the complexity of the matter under review makes the 150 day period impracticable, or

(2) When the applicant requests a delay in the proceedings in order to submit new evidence or submissions.

With respect to the latter circumstance, the amount of time which the applicant may request to delay the proceedings should be capped at a maximum of 45 days. The respondent would, if requested in order to submit new evidence or submissions, then be entitled to receive an extension up to the length of the extension period granted to the applicant. The combined periods of extension would then be added to the initial 150 day period in order to determine the new due date for the Review Manager's decision.

By way of illustration, assume the applicant receives an extension of 45 days to obtain a new medical report, and that the respondent was granted an extension of 30 days to obtain a response to that report. The combined delay of 75 days would then be added to the initial 150 day period, thereby requiring the Review Manager to render his/her written decision within 225 days from the date of the commencement of the application for an internal review.

Finally, I recommend that the written decision letter rendered by the Review Manager clearly indicate any right with respect to a further appeal to the external Appeal Tribunal, including reference to the time limit within which such an appeal must be commenced.

8. Suspension of Proceedings

Should there be an ability for the internal review process to suspend a party's appeal pending the determination of other related issues that are still at the initial decision-making level? Current examples of such related issues include:

(i) The worker's entitlement to temporary wage loss benefits is terminated as his/her condition is found to have stabilized. The claim file has been sent to Disability Awards to determine what pension award the worker should receive. The worker commences an appeal from the decision to terminate wage loss benefits. However, he/she may not want to pursue this appeal if a satisfactory pension award is granted.

(ii) A worker is awarded a 25% functional award for a physical disability, which he/she believes is too low. The worker is also being assessed for any psychological disability which he/she may have arising from the accident. The worker appeals the functional award, but wants to await the result of the psychological assessment before deciding whether or not to proceed with the appeal.

In my opinion, there is merit in having the application for internal review suspended pending the determination of related issues by the initial decision-maker. I base this opinion on the following two reasons:

(i) Awaiting the determination of related issues would allow the internal review process to consider the appellant's claim as a whole. I perceive at least two distinct advantages with proceeding in this manner. **First**, I envision a higher quality of adjudication when the Review Manager is able to consider all related aspects of the appellant's application before making his/her determination.

Second, awaiting the determination of related issues would avoid multiplicity of appeal proceedings, since the Review Manager would be able to determine all of the issues at one time.

(ii) The power to suspend proceedings can result in the avoidance of unnecessary adjudication. For example, if the worker in either of the above examples was satisfied with the subsequent determination by the initial decision-maker, it is entirely possible that the worker would then withdraw his/her appeal with respect to the first decision. In such circumstances, the power to suspend the proceeding would result in the internal review process not having to consider and determine the worker's appeal.

Accordingly, I recommend that there should be a power to suspend an application for internal review, based upon the following premises:

(i) The power to suspend should only be utilized when there are one or more related issues pending determination by the initial decision-maker.

(ii) The determination as to whether the suspension of the internal review application would be granted should be made by the Director of the internal review division (or his/her delegate).

(iii) A request to suspend the application for internal review can originate through:

(1) the appellant, or

(2) the Director (or his/her delegate), on his/her own motion.

In the latter situation, the appellant would have to consent before the application for internal review could be suspended by the Director.

(iv) Once an application for internal review is suspended, it would be held in abeyance pending the determination of the related issue(s) by the initial decision-maker. The appellant would then have 90 days from the date of such determination to reactivate his/her suspended application for internal review.

9. Stay of Proceedings

I agree with the premise currently set out in Section 203 of the *Act* – an application for an internal review does not operate as a stay of the decision under appeal, unless the Review Manager directs otherwise. Accordingly, I recommend that a provision similar to Section 203 be included in the legislation with respect to the internal review process.

10. Decision on Internal Review

It is my expectation that the Review Managers will in most cases be able to render their decisions based upon the evidence and submissions presented to them. However, there may be occasions when the Review Manager determines that further inquiry must be conducted before a full and proper decision can be rendered on the matter under review. In such circumstances, it is my opinion that the internal review process is not the proper level within the WCB to adequately conduct such further inquiry – in terms of both available resources and timing.

For example, a worker may have submitted an application for compensation arising from what was initially diagnosed as chronic obstructive pulmonary disease (COPD). During the appeal process following the denial of the worker's claim, it is determined that the worker's condition should actually have been diagnosed as asthma – not COPD. (Asthma is listed in Item #6 of Schedule B to the *Act*, while COPD is not listed on Schedule B.) If the Review Manager determines that there is insufficient evidence before him/her to determine whether the worker met any of the required exposures set out in Item #6 of Schedule B, the Review Manager should have the authority to refer the matter back to the initial decision-making level of the WCB to conduct the necessary inquiry and to render a further decision.

Similarly, assume a worker seeks compensation benefits for lung cancer which he/she attributes to occupational exposure. Upon appeal, a question arises for the first time as to whether the worker had any occupational exposure to asbestos which may have contributed to his/her condition and, if so, how much exposure. Once again, the Review Manager may determine that he/she has insufficient information to render a decision on this aspect of the claim, and would therefore refer the matter back to the initial decision-making level of the WCB.

Accordingly, the Review Manager should have the discretion to refer a matter back to the initial decision-making level of the WCB in those cases where a further inquiry is required in order to properly determine the issue raised by the affected party. The subsequent decision rendered by the initial decision-maker, after completing the inquiry as directed by the Review Manager, would be subject to a new application for initial review brought by any affected party. I therefore make the following recommendation:

In determining an application for internal review, the Review Manager would have the authority to

(i) confirm, vary or cancel the decision under review, or

(ii) refer the matter back to the initial decision-making level of the WCB to conduct any further inquiry and to render any further decision that the Review Manager may direct is necessary.

Finally, I anticipate that there will be cases before the Review Manager where the issue of the lawfulness of a published policy of the WCB will be raised. In such circumstances, the Review Manager should proceed on the basis that the published policies of the Board of Directors are lawful under the *Act*, and would therefore render his/her determination on that basis. A party to the application for internal review who disagrees with the Review Manager's determination will be entitled to raise the issue of the lawfulness of the applicable published policy upon his/her further appeal to the external Appeal Tribunal. (I will be discussing the Appeal Tribunal's authority, with respect to the issue as to whether a published policy of the WCB is unlawful under the *Act*, later in the next section of this Report entitled "Policy Issues".)

11. Reconsideration

I do not believe that a Review Manager should have any authority to reconsider his/her decision once it has been rendered to the interested parties. Any continuing dissatisfaction with the Review Manager's decision must be expressed through the external appeal process.

I will be elaborating on the topic of "reconsideration" in a later section of this Report entitled "Reconsiderations/Reopenings".

12. Royal Commission Recommendation – Mandatory Re-Adjudication

The Royal Commission recommended that there should be two internal review steps before an appeal could be brought to a new external Appeal Tribunal. These two internal steps are:

(i) mandatory re-adjudication by the initial adjudicator, and

(ii) internal review by a senior and experienced adjudicator serving as a Review Officer.

With respect to the first internal step, the party's objection would not trigger a reconsideration of the initial decision – it would initiate a re-adjudication of the original claim. The Royal Commission described this first step on pages 28 and 29 of its *Final Report*:

> A mandatory re-adjudication of the initial claim should be required before any decision is taken to appeal. The original adjudicator must have an opportunity to review new information or reconsider the application of the legislation, rules or policies to the claim before an appeal goes forward. Even if the claimant does not produce new information for the adjudicator to consider, the opportunity to reconsider the presenting information is an important first step in reducing the number of subsequent appeals. It reaffirms the notion that adjudication is one of the board's most important roles and that it is not the responsibility of appeal tribunals.

I do not agree with the Royal Commission's recommendation concerning mandatory re-adjudication. The simple reality is that the claim would be re-adjudicated by the same person who made the initial determination. In my lay opinion, human nature is such that the person will most often arrive at the same conclusion as he/she had previously reached, even in those cases where new information or arguments have been submitted.

Such a process would, in my view, simply be a waste of time. Creating a new appellate structure which would start with further delays and frustrations (while awaiting the initial decision-maker's re-adjudication) does not strike me as the way to build an effective and credible appeal system.

D. External Appeal

1. Final Level of Appeal – Internal or External Tribunal?

Should an appeal from a decision rendered through the WCB's internal review process (which would be to the final level of appeal in the workers' compensation system) be brought to a tribunal which is internal to, or external from, the WCB itself?

To be frank, I have mixed emotions with respect to this issue (although the heading of this section obviously gives away the punchline). I do perceive several advantages to having the final appellate level within the WCB. For example, an internal Appeal Tribunal would be directly accountable to the governing body of the WCB, which should make it easier for the Board of Directors to ensure that the Appeal Tribunal's decisions adhere to the policy directions established by the Directors.

Furthermore, an appellate tribunal which is internal to the WCB should remove, or at least reduce, the potential for confrontation between two independent organizations, particularly with respect to the issue as to where the authority to create and to interpret policy really lies. On this point, I share the apprehension raised on page 22 of the *Munroe Report* with respect to the establishment of an external tribunal:

> Whether one chooses an "internal" or "external" system, it is irrefutable that only one body should be making policy; further, that that body should be the Board of Governors with the advice and assistance of the executive side of the system. From the experience of at least one Canadian jurisdiction, and this strikes us as predictable, the establishment of a purely "external" tribunal of last resort sets up

> a competition as to where the general policy-making for claims really resides. That is counter-productive both to the work of the system and to its overall credibility.

Notwithstanding the above comments, there is one overriding factor which drives me to the conclusion that the final level of appeal must be to an external tribunal – the perception, in the mind of a party of interest who is dissatisfied with a decision of the WCB, that his/her final appeal is to a tribunal which is independent from the WCB. Since the first two levels of the adjudicative process (ie: the initial decision-maker and then the Review Manager who conducts the internal review) will both be internal to the WCB, it is, in my opinion, essential that a person, who is dissatisfied with a decision emanating from the WCB, has the opportunity to raise his/her concerns before a tribunal which is external to the organization by which the person feels aggrieved.

The Royal Commission similarly recommended that the final level of appeal should be external to the WCB. In doing so, the Royal Commission noted the following concerns (on page 25) with respect to the existing appellate structure:

> It is difficult to gauge the actual independence or dependence of a body such as the Appeal Division. It is clear from the submissions and presentations to the commission, however, that many workers and employers do not believe that the division meets at least one of the fundamental criteria for an independent administrative tribunal established to administer justice – the perception of independence. And while the external Review Board is arguably the most independent appeal body in the current system, the fact is that its decisions are reviewable by the internal Appeal Division (an inherently illogical practice that the commission could not find reflected in any other jurisdiction). This sequence critically affects the systems credibility with many appellants.

By way of final comment, I note that in all other Canadian jurisdictions, with the exception of Saskatchewan, the final level of appeal in the workers' compensation system is to an external tribunal.

Accordingly, it is my recommendation that the final level of appeal in the BC workers' compensation system should be to a tribunal which is external to, and independent from, the WCB. (For the purposes of this Report, I will be referring to this external tribunal as the "Appeal Tribunal".) The Appeal Tribunal should be established at its own location, separate from any operation of the WCB, and should have its own staff, again separate from the WCB.

Notwithstanding my recommendation to have the final level of appeal be external to the WCB, I must stress that both the WCB and the external Appeal Tribunal are essential and interrelated parts of the overall workers' compensation system in BC. In order for the external appellate model to be successful, both organizations must be prepared to develop and maintain a close and effective working relationship with each other. Accordingly, it is imperative that the persons appointed to each of the positions of Chair of the WCB Board of Directors and Chair of the Appeal Tribunal fully accept the concept that each organization will strive to ensure an effective working relationship between the two for the overall betterment of the workers' compensation system as a whole.

2. Selection of the Chair of the Appeal Tribunal

As was the case with the Chair of the Board of Directors, it is my recommendation that the responsibility for appointing the Chair to the Appeal Tribunal should rest with the Lieutenant Governor in Council. On this point, I raise the following criteria for consideration with respect to the selection of the Chair:

(i) The process used to select the appropriate person to be the Chair of the Appeal Tribunal must be one which is open and transparent.

(ii) The selection of the Chair of the Appeal Tribunal must be done on the basis of merit. On this point, I refer to the following paragraph on page 14 of the *Munroe Report* where several characteristics were identified with respect to the selection of the proposed position of Chief Appeal Commissioner of the Appeal Division:

> The chief appeal commissioner should be selected for his or her ability to fairly judge statutory and factual issues; the skill he or she is likely to bring to the conduct and supervision of quasi-judicial proceedings; generally, the credit he or she will bring to the workers' compensation system.

(iii) The Chair of the Appeal Tribunal must be perceived by the major stakeholders as being a fair and impartial representative of the workers' compensation system as a whole.

(iv) The Chair must be independent from Government (although the Chair will be accountable to Government for the overall performance of the Appeal Tribunal) and from the WCB.

(v) In my view, it would be an asset if the Chair had:

(a) legal training, and

(b) experience within/knowledge of the workers' compensation system.

3. The Role of the Chair of the Appeal Tribunal

The responsibilities of the Chair of the Appeal Tribunal would include, but not be limited to:

(i) the appointment and re-appointment of Vice-Chairs and Members of the Appeal Tribunal (on a full-time, part-time or contract basis);

(ii) setting the performance measurements for the Vice-Chairs and Members of the Appeal Tribunal, and evaluating the Vice-Chairs and Members in accordance with those performance measurements;

(iii) the overall administration of the Appeal Tribunal, including budgeting and hiring of staff;

(iv) the overall responsibility for the administration and operation of Medical Review Panels (as discussed later in this section of the Report);

(v) the establishment of policies and procedures for the administrative and substantive conduct of the Appeal Tribunal's business;

(vi) presiding over meetings of the Appeal Tribunal;

(vii) adjudicating appeals brought to the Appeal Tribunal, either as a one-person Panel or as the Chair of a three-person (or greater) Panel;

(viii) establishing Panels to determine appeals brought before the Appeal Division;

(ix) granting of extensions of time with respect to the commencement of an appeal to the Appeal Tribunal, or to the time frame within which the Appeal Tribunal's decision must be rendered;

(x) deciding whether an appeal should be suspended pending the determination of related issues at a lower level of adjudication; and

(xi) delegating, in writing, any of the Chair's powers and duties subject to any terms and conditions set out in the delegation.

In the "Governance" section of this Report, it was recommended that the Chair of the Appeal Tribunal should not be a member of the Board of Directors of the WCB. However, there will need to be regular communication/interaction between the Chair of the Appeal Tribunal and the Board of Directors of the WCB with respect to matters of common interest and importance to both organizations. Accordingly, it is my recommendation that the legislation specifically require the Chair of the Appeal Tribunal to attend the Board of Directors meetings on a regular basis (at least quarterly) to report on matters of common interest and importance from the perspective of the Appeal Tribunal.

Finally, as noted in the responsibilities enunciated above, I envision that the Chair will play a leadership role with respect to both the administrative and the adjudicative aspects of the Appeal Tribunal. However, the larger the organization, the more time-consuming becomes the administrative responsibilities. In my opinion, it is important for the Chair to be involved in the adjudication of issues of significance to the workers' compensation system. Accordingly, ways must be found to allow the Chair the opportunity to fulfill this adjudicative responsibility.

One concept that may assist in achieving this objective is to have the legislation specifically provide for an Executive Director position within the Appeal Tribunal. This position would be appointed by the Chair of the Appeal Tribunal, and would be responsible for all of the administrative aspects of the Appeal Tribunal's operations. The Executive Director would report to the Chair of the Appeal Tribunal, who is ultimately accountable to Government for the overall administration and operation of the Appeal Tribunal.

4. The Appointment of Vice-Chairs

As discussed previously, the Chair of the Appeal Tribunal should be responsible for the selection of Vice-Chairs. Within the Appeal Tribunal's budget parameters (which are ultimately submitted to, and approved by, Government), the Chair of the Appeal Tribunal should have the authority to determine the number of Vice-Chairs required, as well as the qualifications and experience needed at the Appeal Tribunal. The Chair must also be able to:

(i) appoint Vice-Chairs (on a full-time, part-time or contract basis) in a timely manner to meet the needs of the Appeal Tribunal,

(ii) determine whether or not to renew the appointment of any particular Vice-Chair, and

(iii) revoke the appointment of any particular Vice-Chair if there is just cause to do so.

In order to maintain the credibility of the Appeal Tribunal as a quasi-judicial body which is independent from Government, the Chair must be able to exercise these powers without encountering the political roadblocks that often arise when the ultimate authority to appoint rests with Government. Of course, the Chair is ultimately accountable to Government for the overall operation of the Appeal Tribunal, which would include the selection of the Vice-Chairs made by the Chair.

With respect to the process used by the Chair to select Vice-Chairs, it is once again my opinion that it must be one which is open and transparent. The actual selection of Vice-Chairs must be done on the basis of merit and competency to perform the required duties. Vice-Chairs, who will be responsible for the adjudication of appeals brought predominantly by workers or employers, must be perceived by those stakeholders as being fair and impartial.

5. The Appointment of Members

Should the Chair have the authority to appoint worker and employer representatives as either full-time or part-time Members of the Appeal Tribunal? In my opinion, the answer is yes. There are occasions when the perspectives of worker and employer representatives will be of value in reaching a determination on an issue before the Appeal Tribunal. For example, I perceive that worker and employer Members, if included in the constitution of a Super Panel (as discussed later), will be in a position to contribute significant input on behalf of their respective communities with respect to the adjudication of issues which are of importance to the workers' compensation system as a whole. Similarly, I believe that worker and employer Members can play a valuable role with respect to the use (and, hopefully, the success) of mediation as an alternate dispute resolution process in appropriate cases (which is also discussed later). However, I do not believe that such occasions will be the norm.

Accordingly, I recommend that the Chair of the Appeal Tribunal have the authority to appoint a complement of Members up to a maximum of two "full-time equivalent" worker Members and two "full-time equivalent" employer Members (on a full-time, part-time or contract basis). The Chair should engage in consultation with the appropriate representatives of the worker and employer communities, respectively, before making such appointments, bearing in mind that it is ultimately the Chair's decision whom to appoint as Members. I further recommend that appointed Members cannot be assigned to act as one-person Panels in determining appeals before the Appeal Tribunal, or as the presiding Chair of a three-person Panel.

6. Remuneration

It is my opinion that the remuneration paid to the Chair, Vice-Chairs and Members of the Appeal Tribunal must be sufficient to attract and maintain the type of qualified, competent and credible candidates needed to fill these positions. As I had previously noted in the "Governance" section of this Report, I anticipate that this issue (of the proper level of remuneration to be provided to adjudicators working at administrative tribunals) will be addressed on a wider basis by the Administrative Justice Project.

7. The Term of Appointment

The term of the appointments to the Appeal Tribunal must be for a sufficient length of time so as to allow the appointees to achieve maximum competency and efficiency in fulfilling their responsibilities, as well as to reflect the independent nature of the Tribunal. Accordingly, I recommend a term of appointment of three or four years for the Vice-Chairs, and for any Members who may be appointed (unless the particular Vice-Chair or Member is appointed on a contract basis in which case the term of the appointment will be as specified in the contract, up to a maximum of four years), and a term of appointment of five years for the Chair in order to provide greater continuity and stability in his/her leadership role. I further recommend that any of the above appointments should be eligible for reappointment.

8. Exclusion from any Bargaining Unit

The *Act* should expressly exclude the Chair, Vice Chairs and Members of the Appeal Tribunal from any bargaining unit representation by a trade union (as is currently the case with respect to the Chief Appeal Commissioner and other Appeal Commissioners appointed to the Appeal Division, as well as to the Chair, Vice Chairs and Members appointed to the Review Board).

9. Revocation of Appointment

Sections 85(3) and (4) of the existing legislation provide that the Chief Appeal Commissioner and other Appeal Commissioners of the Appeal Division may only be removed from their positions for "just cause". Section 85(5) then states:

> For the purposes of subsections (3) and (4), just cause does not arise in a case where an appeal commissioner makes a decision with which the governors do not agree with respect to an appeal.

The Royal Commission stated the following, on pages 49 and 50 of its *Final Report*, with respect to this point:

> The commission believes that it is essential that the tenure of tribunal members be secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner.
>
> ...
>
> An appeal commissioner's term of office should not be terminated, except for just cause.

I agree with all of the above concepts, and therefore recommend that they be incorporated into the legislation with respect to the Government's authority to revoke the appointment of the Chair of the Appeal Tribunal, and to the Chair's authority to revoke the appointment of any Vice-Chair or Member.

10. What can be the Subject of an External Appeal?

Subject to the exceptions referred to below, any adjudicative decision made by a Review Manager during the internal review process should be appealable to the Appeal Tribunal. Once again, an "adjudicative decision" is not intended to include a procedural or administrative decision made by the Review Manager or the Director of the internal review division acting within the authority provided to them under the Act. On this point, a particularly contentious issue within the existing appeal structure concerns the view of the Appeal Division that it has the authority, pursuant to Section 91(1) of the Act, to consider an appeal from a decision of the Review Board refusing to grant an extension of time to an interested party to bring his/her appeal to the Review Board.

In my opinion, the decision to refuse to grant an extension of time is a procedural matter, and should not be appealed to the next level of appeal. Accordingly, it is my recommendation that the legislation should expressly state that any decision by the Director of the internal review division, or his/her delegate, to grant, or not to grant, an extension of time cannot be made the subject of an appeal to the Appeal Tribunal.

Once again, the subject matter of the appeal should not be limited to what the Review Manager actually dealt with in the four corners of his/her decision letter. Rather, the appeal would encompass any issue which the Appeal Tribunal believes should have reasonably been dealt with by the initial decision-maker in his/her decision letter, or by the Review Manager during the subsequent internal review process.

11. Standard of Review

As was the case with respect to the internal review process, it is my recommendation that the appeal should be conducted on a substitutional basis, whereby the Appeal Tribunal would have the discretion to confirm, vary or cancel the decision which is the subject matter of the appeal. Since this stage of the appeal process will be the first (and only) opportunity for the appellant to express his/her dissatisfaction with a WCB decision to a body which is external from the WCB, it is imperative that the appellant has (and, as importantly, perceives he/she has) a full opportunity to have an independent tribunal conduct a broad review of the disputed issue, and render its final decision on the matter.

As was the case with the internal review process, since the external appeal would be conducted on a substitutional basis, the parties of interest would be entitled to present new evidence that had not been brought to the attention of the previous decision-makers. This new evidence would be considered by the Appeal Tribunal itself, and would not be referred back to either the initial decision-maker or the Review Manager for their consideration prior to the Appeal Tribunal rendering its decision in the matter.

When considering the standard of review to be utilized at the internal review level, I identified several issues with respect to which the more restrictive "supervisory" standard of review should be applied. In my opinion, these same issues should not be the subject of any further appeal from the internal review process to the Appeal Tribunal. I base my opinion on the same reasoning I had advanced with respect to why the standard of review for these issues should be more restrictive at the internal review level. Furthermore, restricting the access of these issues to the Appeal Tribunal is necessary in order to reduce the volume of appeals which the Appeal Tribunal will be expected to handle.

Accordingly, it is my recommendation that the decision of the internal review process be final and conclusive, and that no further appeal can be brought to the Appeal Tribunal, with respect to the following issues:

(i) Decisions by the Prevention Division to render an Order, or not to render such an Order, pursuant to Part 3 of the *Act*, with the exception of Orders which are relied upon by the WCB to impose an administrative penalty or to initiate a prosecution, or of any Orders to cancel or suspend a certificate made pursuant to Section 195 of the *Act*.

(ii) Decisions rendered by the Assessment Department concerning the Rate Group or Industry Subsector/Sector to which an industry is assigned for assessment purposes.

(iii) Any vocational rehabilitation decisions made by the WCB concerning the eligibility, nature and extent of vocational rehabilitation services provided to disabled workers (pursuant to Section 16(1) of the Act) or to surviving dependants of a deceased worker (pursuant to Sections 16(2) and (3) of the Act).

(iv) Decisions applying the indicated percentage of impairment of earnings capacity on the Permanent Disability Evaluation Schedule or on the permanent impairment rating schedule for chronic pain (to be developed by the WCB), provided that the specified percentage of impairment has either no range, or a range which does not exceed 5%.

(v) Decisions whether or not the WCB should commute a pension or survivor benefit award.

(vi) Any decisions made by the WCB concerning the eligibility, nature and extent of any allowances or similar expenditures which the WCB has the discretion to provide, including

  (a) clothing allowances,

  (b) personal care expenses or allowances,

  (c) independence and home maintenance allowances,

  (d) transportation allowances,

  (e) subsistence allowances, and/or

  (f) homemakers' services.

12. How the Appeal Tribunal may deal with Appeals

It is my belief that the Appeal Tribunal should utilize the broadest arsenal of mechanisms available in order to resolve the appeals brought to it from the internal review process. These mechanisms would include alternate dispute resolution, pre-hearing conferences, the pooling of similar appeals into one hearing, and the use of "Super Panels" to adjudicate issues of importance to the workers' compensation system as a whole. I will now elaborate upon each of these mechanisms.

(a) Alternate Dispute Resolution ("ADR")

Generally speaking, ADR would involve the use of mediation by the Appeal Tribunal to seek a consensual resolution amongst the parties of interest in the particular appeal. The first comment to emphasize is that ADR would not be an appropriate mechanism to use when the issue under appeal concerns a question of entitlement to compensation benefits under the Act. For example, Section 5(1) requires the worker's personal injury or death to "arise out of and in the course of employment". An appeal with respect to the question as to whether the worker's injury did actually arise out of and in the course of employment concerns the foundation to the worker's entitlement to compensation benefits, and would therefore require adjudication (and not ADR) to resolve.

When ADR would be an effective mechanism should be left to the discretion of the Appeal Tribunal to determine based on the particular circumstances of the issue under appeal, and the willingness of the parties of interest to attempt to achieve a consensual resolution. I certainly envision that ADR could well be an effective mechanism to assist the Appeal Tribunal in resolving appeals involving "deeming" issues, or prevention appeals by employers with respect to the imposition of an administrative penalty.

There are several other points which I wish to emphasize with respect to the utilization of ADR by the Appeal Tribunal.

(i) The use of ADR must be consensual. If any objection to the use of ADR is raised by a party of interest who is participating in the appeal, then the ADR process should not be utilized.

(ii) ADR must be a non-binding process, unless the parties of interest agree to a consensual resolution. If an issue cannot be resolved through ADR, then the Appeal Tribunal would have to adjudicate the appeal.

(iii) The Vice-Chair(s) and Member(s), who may ultimately adjudicate any of the issues under appeal, must not be the same person(s) who would have been involved in the ADR process with respect to that particular appeal.

(iv) The persons at the Appeal Tribunal who would be involved in ADR would require training specific to the use of ADR mechanisms.

(v) For ADR to be an effective resolution mechanism, it is my belief that representatives from the WCB must be involved in the process. Any consensual agreement reached through ADR at the external Appeal Tribunal must still be implemented by the WCB, and therefore should be acceptable to the appropriate WCB representatives based on the nature of the issues under appeal.

(b) Pre-Hearing Conferences

In my opinion, pre-hearing conferences (or case management meetings), if utilized properly, should prove to be an excellent tool in assisting the Appeal Tribunal to deal with an appeal in a timely and fair manner. The pre-hearing conference would provide the Panel assigned to the appeal with the opportunity to meet with the parties of interest (either in person or through telephone/video conferencing) in order to:

(i) identify the issues which will need to be adjudicated;

(ii) determine what additional evidence, including any new medical or expert evidence, will be required, and set a time frame for the production of such evidence;

(iii) resolve any procedural issues which may be of concern, such as whether an oral hearing would be conducted and, if so, when and for how long the hearing would be scheduled;

(iv) determine whether any particular issue, which is the subject matter of the appeal before the Appeal Tribunal, should be referred to the ADR process for the potential of reaching a consensual agreement; and

(v) consider whether there is a need for the Appeal Tribunal to refer the worker to a Medical Review Panel. (I will be elaborating on my recommendations concerning the Medical Review Panel process later in this section of my Report.)

The pre-conference hearing would also provide the parties of interest with the opportunity to communicate directly with the Panel assigned to adjudicate the appeal. Such communication would be beneficial in assisting the parties to understand the appeal process in which they are involved, and the issues and evidence that will need to be addressed in order for a determination to be reached by the Appeal Tribunal.

I envision that it would be the norm for the Appeal Tribunal Panel to utilize the pre-hearing conference mechanism in order to focus the parties on the actual issues which must be resolved. With respect to whether such pre-hearing conferences should be mandatory in every appeal, I agree with the following comments by the Royal Commission on page 54 of its *Final Report*:

> The commission considered making pre-hearing conferences mandatory, but concluded that they may not be necessary in every case. Instead, the Appeal Tribunal should prescribe rules for initiating a pre-hearing conference. The appeal commissioner assigned to the file would determine the need for a pre-hearing conference, contact the appellant and the respondent (if any) and set a date. The commissioner should be able to compel a party to attend; failure to comply should have direct consequences for the appeal or objection in question.
>
> The appeal commissioner would also determine what additional information is needed to resolve the case and be responsible for determining the most efficient and timely method for getting that information.

(c) Pooling of similar Appeals

At any given time, the Appeal Tribunal may have multiple appeals before it which involve the same general issue of policy or law. In such circumstances, it is my opinion that a "pooling" of these appeals under one Panel of the Appeal Tribunal would assist in having the appeals resolved in a cost-effective, timely and consistent manner.

If an oral hearing was required, all of the appeals would be dealt with at the same time. The Panel would have to consider what steps, if any, it may need to take to ensure the privacy of information which is particular to one of the parties before it.

(d) The use of "Super Panels"

I have no doubt that the Appeal Tribunal will be called upon to adjudicate matters of policy or law which are of significant importance to the workers' compensation system as a whole. In such circumstances, the Chair of the Appeal Tribunal should have the discretion to appoint a "Super Panel" to determine the issue. Such "Super Panels" would consist of more than 3 persons, and should generally have the Chair as the presiding person of the Super Panel (although the Chair would have the authority to assign another Vice-Chair to preside as Chair of the Panel).

The Chair of the Appeal Tribunal would also have the authority to conduct an "open" hearing (either by written submissions or an oral hearing) into the issues before the "Super Panel." Such an "open" hearing would provide invited stakeholders with the opportunity to present submissions to the Super Panel.

Finally, it is my view that decisions rendered by the Super Panel must generally be followed by subsequent Panels of the Appeal Tribunal. The rationale for establishing a Super Panel is to provide leadership and direction for other decision-makers with respect to adjudicative issues of importance to the workers' compensation system. Accordingly, subsequent Panels of the Appeal Tribunal should not have the discretion to reach a different conclusion on the same issue which had previously been determined by a Super Panel, unless the circumstances of the subsequent appeal before the Appeal Tribunal Panel clearly distinguish its case from that determined by the Super Panel.

13. Oral Hearings

The decision as to whether or not an oral hearing should be held, with respect to any particular appeal, would rest within the discretion of the Appeal Tribunal. In other words, oral hearings, if requested by a party of interest, would not be mandatory. On this point, I agree with Recommendation #71 set out by the Royal Commission on page 55 of its *Final Report*:

> The Appeal Tribunal need not consult with the parties to the appeal before making a decision to accept or deny a request for an oral hearing or a read and review.

I also agree with the Royal Commission's view that the Appeal Tribunal should develop appropriate guidelines with respect to the criteria which should be considered in determining whether or not an oral hearing should be held. These guidelines should be accessible to the public, in order that parties of interest would have knowledge of the criteria upon which they could base their request for an oral hearing.

14. Powers of the Appeal Tribunal

With respect to the authority of the Appeal Tribunal to conduct an appeal which is before it, I adopt the following paragraph from page 38 of the Royal Commission's *Final Report*:

> The commission believes that appeal tribunals should have full authority to inquire into all aspects of an appeal *including the right to examine documents*, order investigations or medical examinations, to compel the attendance of witnesses and examine them under oath, and to compel the production and inspection of books, papers, documents and things. It should have the authority to cause depositions of witnesses residing in or out of the province to be taken before a person appointed by the tribunal in a similar manner to that prescribed by the Rules of the Supreme Court. The tribunal should also have the Appeal Division's statutory authority to determine its own practices and procedures for the conduct of appeals, subject to any specific requirements that may be set out under the *Act*. Guidelines could be established to define the measure of an appeal tribunal's duty to investigate, but that would be an administrative responsibility of the tribunal.

In particular, the Appeal Tribunal must have the authority to seek further evidence when it believes it is necessary to do so in order to reach a determination in the matter before it. For example, the Panel may determine that it requires a medical opinion with respect to an issue where there is insufficient (or no) medical evidence currently before it. In such circumstances, the Appeal Tribunal must have the authority to retain the services of an appropriate medical practitioner or specialist to provide the requested opinion.

There are two further matters on this topic upon which I wish to specifically comment. **First**, should the Appeal Tribunal have the authority to retain jurisdiction over the implementation of its decisions? The obvious advantage of such an authority is that it avoids the delay and frustration associated with requiring the successful appellant of having to once again appeal an implementation decision through the internal review process before getting back to the Appeal Tribunal. The Royal Commission did recommend that the Appeal Tribunal should expressly have this authority set out in the legislation (on page 39 of its *Final Report*):

> Assigning jurisdiction over the implementation of its decisions to the Appeal Tribunal would meet the need to ensure accountability throughout the claims adjudication and appeal system while providing successful appellants with the ability to return to the tribunal and have implementation problems dealt with in a timely fashion.

Although I can appreciate the merit behind this recommendation, my opinion is that the Appeal Tribunal should not have the authority to retain jurisdiction over the WCB's implementation of the Tribunal's decision. The reasoning for my opinion is based on the following:

(i) It is my intent that the decisions of the Appeal Tribunal should be final and conclusive with respect to the issue before it. Since the appeal will be conducted on a substitutional basis, the Appeal Tribunal should have the authority to obtain all the information it may need to fully determine all of the issues which form the subject matter of the appeal.

(ii) Some issues will obviously have to be returned to the WCB for initial adjudication as a result of a decision from the Appeal Tribunal. For example, a decision by the Appeal Tribunal to accept a claim for compensation (which had previously been denied) would generally need to be returned to the WCB to determine what compensation benefits flowed from that decision.

Any appeals from such initial adjudication should proceed through the internal review process. As previously noted, one of the major objectives of the internal review process is to enhance consistency and predictability within the WCB decision-making process. I do not believe it would be appropriate to forego that objective in those cases where the WCB is rendering initial adjudicative decisions arising from a decision of the Appeal Tribunal.

(iii) I have recommended time frames within which the internal review process must be completed. This will result in a more timely return to the Appeal Tribunal, when the appellant is still dissatisfied with the "implementation" decision rendered through the internal review process, than exists under the current appeal structure (involving an appeal to the Review Board before accessing the Appeal Division).

(iv) Finally, I do not want to open up a new set of issues which will need to be resolved through the appeal system – ie: what is an "implementation" decision versus a new initial adjudication decision. For example, let us return to the situation where the Appeal Tribunal accepts an application for compensation which had previously been denied. Broadly speaking, are not all subsequent decisions of the WCB (which may involve such diverse issues as the amount and duration of temporary wage loss benefits, the pension entitlement the worker may have, vocational rehabilitation services which may be provided, etc.) "implementation" decisions since they need to be addressed by the WCB solely as a result of the Appeal Tribunal's decision? If not, where would the line be drawn between "implementation" and "initial adjudication" decisions?

Second, there is a question concerning the representational rights for a defunct employer – ie: an employer who has ceased business and is no longer registered with the WCB at the time that the Appeal Tribunal proceeding is being conducted. Section 90(2) of the *Act* currently contemplates this scenario with respect to a matter before the Review Board. Section 90(2) reads:

> Where the employer of a worker referred to in subsection (1) has ceased to be an employer within the meaning of Part 1, the review board may, for the purposes of an appeal under subsection (1), deem an organized group of employers which includes as members employers in the subclass of industry to which the employer belonged to be the employer of the worker.

Decision #75 of the Governors (1994), 10 WCR 753 recognizes, by policy, a similar authority for the Appeal Tribunal. The following is stated on page 754, under the heading "Representation Before the Appeal Division":

> Where the participation of other parties in the procedure will assist inquiry into the merits of the issues, the Appeal Division may give notice to or allow intervention by these other parties. For example, where an employer is no longer

registered with the Board, the Appeal Division may give notice of an appeal commenced by a worker to the relevant industry association and the employers' advisor.

The Appeal Division has recognized this discretion (to invite the participation of other parties in the particular proceedings before the tribunal) in its Decision No. 33 (2001), 17 WCR, which sets out the practices and procedures of the Appeal Division.

In my opinion, the new Appeal Tribunal must have the similar authority to invite other parties to participate in its proceedings in those cases where such participation will assist the Panel in its inquiry into the merits of the issues before it. In particular, where an employer is no longer registered with the WCB at the time of the proceedings, the Appeal Tribunal should have the discretion to invite the relevant industry association and/or the Employers Advisory Office to participate.

15. Time Limits

a. The Commencement of the Appeal

With respect to the time limits for an appeal to be brought to the Appeal Tribunal, I make the same recommendations as enunciated for the internal review process, with one exception. In particular, I recommend that an appeal must be brought to the Appeal Tribunal within 30 days (as opposed to 90 days) from the day the Review Manager's decision was communicated to the affected party. This shorter time frame is based on the recognition that the appellant had already proceeded through the internal review process, and therefore should not require the longer period of time to determine whether to pursue any further appeal rights he/she may have.

Accordingly, I recommend:

(i) An appeal from a decision rendered by the Review Manager must be brought within 30 days from the day the decision in dispute was communicated, in writing, to the affected party.

(ii) The appeal application must be made in writing, or in another manner acceptable to the Appeal Tribunal; identify the decision from which an appeal is brought; and state the basis on which the appeal is made and the outcome requested.

(iii) The Chair of the Appeal Tribunal (or his/her delegate) should have the discretion to grant an extension of time, with respect to the commencement of an appeal, in order to avoid an injustice in those circumstances where the appealing party has missed the mandatory time limit for commencing the appeal.

(iv) Once an appeal is submitted within the 30 day time frame (or the extended time frame if an extension is granted), the Appeal Tribunal would have the authority to direct the WCB to provide an update of the disclosure documentation from its files to the parties of interest in the appeal.

(v) The Appeal Tribunal should advise the respondent of its right to participate in the appeal, and of its obligation to notify the Appeal Tribunal within a specified time frame if it does intend to participate.

(b) The Rendering of the Decision

Once again, I make the same recommendations as previously enunciated for the internal review process, with one exception. In particular, I recommend:

(i) The Appeal Tribunal decision must be rendered within 180 days of the commencement of the appeal. I have extended this period from 150 days in recognition of the additional mechanisms which may be utilized at the Appeal Tribunal level (such as ADR, pre-hearing conferences and the holding of oral hearings).

(ii) The actual "commencement" date of the appeal should start on the day that the updated disclosure documentation is provided to the appellant.

(iii) The Chair of the Appeal Tribunal (or his/her delegate) should have the discretion to extend the 180 day period where the complexity of the matter under appeal makes the 180 day period impracticable, or where the appellant requests a delay in order to submit new evidence or submissions (which request, if granted, cannot exceed 45 days). The respondent would, if requested in order to submit new evidence or submissions, be entitled to receive an extension up to the length of the extension period granted to the appellant. The combined periods of extension would then be added to the initial 180 day period in order to determine the new due date for the Appeal Tribunal's decision.

(iv) A referral by the Appeal Tribunal to the Medical Review Panel would automatically result in an extension of the time period for the Appeal Tribunal's decision to be rendered. (I will be addressing the Medical Review Panel process in a later part of this section of my Report.)

(v) Where a Panel of the Appeal Tribunal is constituted of three (or more persons), the decision of a majority of the Panel shall be the decision of the Appeal Tribunal. However, if there is no majority, the decision of the person presiding over the Panel shall be the decision of the Appeal Tribunal.

16. Suspension of Appeal

For the reasons previously enunciated with respect to the internal review process, I believe that the Appeal Tribunal should similarly have the power to suspend an appeal, based on the following premises:

(i) The power to suspend should only be utilized when there are one or more related issues pending determination at a lower level of adjudication.

(ii) The determination as to whether the suspension of the appeal would be granted should be made by the Chair of the Appeal Tribunal, or his/her delegate.

(iii) A request to suspend the appeal can originate through:

(1) the appellant, or

(2) the Chair (or his/her delegate), on his/her own motion.

In the latter situation, the appellant would have to consent before his/her appeal could be suspended by the Chair.

(iv) Once an appeal is suspended, it would be held in abeyance pending the determination of the related Issue(s) by the internal review process. The appellant would then have 30 days from the date of such determination to reactivate his/her suspended appeal.

17. Stay of Proceedings

I generally agree with the premise currently set out in Section 210 of the *Act* – an appeal to the Appeal Tribunal does not operate as a stay of the decision unless the Appeal Tribunal directs otherwise. Accordingly, with the one exception noted below, I recommend that a provision similar to Section 210 be included in the legislation.

The one exception would arise in the following situation:

> A WCB Case Manager denies a worker's application for consideration. The Review Manager subsequently overturns the decision upon an application for internal review. The employer then commences an appeal to the Appeal Tribunal.

Pursuant to Section 92(2) of the current legislation, compensation benefits would be paid to the worker prospectively from the date of the Review Manager's decision, but the worker would not be entitled to receive any retrospective compensation pending the decision of the Appeal Tribunal. If the Appeal Tribunal subsequently decides in favour of the worker, interest on the restrospective compensation must be paid to the worker (pursuant to Section 92(3)).

I recommend that these concepts in Sections 92(2) and (3) be incorporated into the legislation with respect to an appeal to the new Appeal Tribunal. This recommendation is based upon my recognition of the WCB's current policy that "decisional" overpayments resulting from actions of the WCB are not recoverable from the worker. Due to the time limits that I have proposed with respect to the external appeal process, I do not believe that the delay, which a worker may face before receiving the retrospective portion of his/her compensation entitlement, will be unduly lengthy.

18. Decision on appeal

I anticipate that the Appeal Tribunal will in most cases be able to render its decision based upon the evidence and submissions presented to it. However, as was the case with the internal review process, there may be occasions when the Appeal Tribunal Panel determines that further inquiry must be conducted before a full and proper decision can be rendered on the matter under appeal. In such circumstances, it is once again my view that the Appeal Tribunal is not the proper level within the workers' compensation system to adequately conduct such further inquiry.

Accordingly, the Appeal Tribunal Panel should have the discretion to refer the matter back to the initial decision-making level of the WCB in those cases when a further inquiry is required in order to properly determine the issue raised by the parties before it. The subsequent decision rendered by the initial decision-maker, after completing the inquiry as directed by the Appeal Tribunal Panel, would be subject to a new application for internal review brought by any affected party.

I therefore make the following recommendation:

> In determining an appeal, the Appeal Tribunal Panel would have the authority to,
>
> (i) confirm, vary or cancel the decision under appeal, or
>
> (ii) refer the matter back to the initial decision-making level of the WCB to conduct any further inquiry and to render any further decision that the Panel may direct is necessary.

19. Section 11 Determination

The opening words of Section 11 of the *Act* read as follows:

> Where an action based on a disability caused by occupational disease, personal injury or death is brought, the board must, on request by the court or by any party to the action, determine any matter that is relevant to the action and within its competence under this *Act*...

At the present time, the above determination pursuant to Section 11 is made by the Appeal Division. I recommend that the new Appeal Tribunal have the responsibility of adjudicating those cases which are referred pursuant to Section 11 of the *Act*.

20. Reconsideration

The Appeal Division presently exercises "reconsideration" powers in the following circumstances:

(i) Pursuant to Section 96.1 of the *Act*, an application for reconsideration of a decision of the Appeal Division may be granted on the grounds that new evidence has arisen or has been discovered subsequent to the hearing of the matter decided by the Appeal Division.

(ii) Pursuant to Section 96(4), the President of the WCB may refer a finding from the Review Board to the Appeal Division for "redetermination" on grounds of error of law or contravention of a published policy of the governors.

(iii) In Decision of the Governors #75 (1994), 10 WCR 753, the Appeal Division was provided with the authority under Section 96(2) of the *Act* to "reopen, rehear and redetermine" any decision made by the former Commissioners of the WCB prior to June 3, 1991 where the Chief Appeal Commissioner finds that the decision was based upon an error of law or involved an issue under the *Canadian Charter of Rights and Freedoms*.

(iv) In Decision #93-0740 (1993), 10 WCR 127, the former Chief Appeal Commissioner of the Appeal Division determined that the Appeal Division has the authority to reconsider one of its previous decisions on the basis of clerical mistakes or omissions, fraud, or an error of law "going to jurisdiction".

With the exception of the ability to reconsider one of its own decisions on the basis of an error of law "going to jurisdiction", I am recommending that the new Appeal Tribunal should not have the authority to reconsider any of its previous decisions (or of any decision of a predecessor appellate tribunal, be it the former Commissioners of the WCB, the Review Board or the Appeal Division). I will be elaborating on the topic of "reconsideration" in a later section of this Report.

With respect to the existing authority for the President of the WCB to refer a Review Board finding to the Appeal Division pursuant to Section 96(4), I do not perceive any need for such discretion within the new appellate structure proposed in this Report. Accordingly, I recommend that Section 96(4) be deleted from the legislation.

As noted above, the former Chief Appeal Commissioner observed (in Decision #93-0740) that the Appeal Division had the authority to reconsider one of its previous decisions on the basis of clerical mistakes or omissions. Although I agree with this observation, I would not characterize such power as a true "reconsideration". For the purposes of this Report, I am dealing with reconsiderations of adjudicative decisions – not corrections of administrative or clerical errors.

Returning to the topic of a reconsideration based upon an error of law "going to jurisdiction", such an error would occur when the tribunal acts outside of its jurisdiction – ie: it's action is ultra vires. Errors of law going to jurisdiction would include:

(i) exercising an authority which the tribunal has no power to do under its enabling legislation;

(ii) making a "patently unreasonable" interpretation of the provisions in the statute;

(iii) making a "patently unreasonable" finding of fact (such as when the finding is not supported by any evidence);

(iv) basing a decision on irrelevant considerations; and

(v) breaching the rules of natural justice.

The Supreme Court of British Columbia also has the inherent power to judicially review a decision made by an administrative tribunal which is outside or in excess of its jurisdiction. Such a challenge to the administrative tribunal's jurisdiction would be brought to the Supreme Court pursuant to the Judicial Review Procedure Act, RSBC 1996, c. 241.

The rationale for the former Chief Appeal Commissioner's decision (that the Appeal Division did have the authority to reconsider one of its previous decisions on the basis of "error of law going to jurisdiction") was set out on pages 128 and 129 of Decision #93-0740, supra:

> The traditional starting point for judicial treatment of administrative reconsiderations is that a tribunal has no inherent power to reconsider its own decisions. The basic rule is that jurisdiction to hear a case previously heard and decided by the same tribunal must be expressly granted by statute to that tribunal: ...
>
> There is a very significant policy reason behind the principle that, in the absence of an explicit statutory provision, a tribunal does not have the power to reconsider its own decision. It is in the public interest for parties to be able to rely generally on the finality of a tribunal decision. ...
>
> On the other hand, it is also in the public interest to avoid unnecessary court proceedings. This would justify giving tribunals flexibility in the matter of reconsiderations.

I agree with the concept that court proceedings in the workers' compensation system should be avoided where possible. The question which arises is whether a statutory tribunal, such as the proposed Appeal Tribunal, has any inherent authority to reconsider one of its own decisions on the basis of an error of law going to jurisdiction.

This issue was recently considered by the BC Supreme Court in its decision dated November 29, 2001 in Atchison v. Workers' Compensation Board (Victoria Registry, Docket #01 2685). In that case, Mr. Justice Vickers stated the following on page 9:

> There is no doubt the courts have the power of review. However, this does not mean that administrative tribunals lack the power to reconsider a decision, particularly where the decision is made without jurisdiction. The doctrine of *functus officio* applies to administrative tribunals based, however, "on the policy ground which favours finality of proceedings, rather than the rule which was

> developed with respect to formal judgments of a court whose decision was subject to a full appeal." *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 at 849. The application of the principle is more flexible and tribunals are able to reopen decisions in order to discharge the function committed to them by the enabling legislation. In particular, where a tribunal has made an error of jurisdiction, it is entitled to correct such an error: *Chandler, supra: Right to Rediscover Appeal Division Decisions* (1993), 10 W.C.B. 127 (A.D.); *Re Trizak Equities Ltd. V. Area Assessor Burnaby New Westminster* (1983) 147 D.L.R. (3d) 637 (B.C.S.C.). (Emphasis added)

Based upon the above jurisprudence, I see no reason to recommend any change to the inherent authority of the Appeal Tribunal to determine whether it will reconsider one of its previous decisions, on the basis of an error of law going to jurisdiction.

Accordingly, it is my recommendation that, subject to the Appeal Tribunal's authority to reconsider one of its previous decisions on the basis of error of law going to jurisdiction, a decision rendered by the Appeal Tribunal:

(i) is final and conclusive, and

(ii) would be protected from a Court challenge by a privative clause similar to what is currently found in Section 96(1) of the *Act*.

21. Publication of Appeal Tribunal Decisions

In its Recommendation #63(b), the Royal Commission recommended that the Appeal Tribunal publish all of its decisions in a manner which does not identify the parties. The Royal Commission elaborated on its recommendation on page 43 of its *Final Report*:

> The commission believes that granting the public full access to "de-identified" decisions will help to provide consistency and predictability throughout the claims adjudication and appeal system.

I agree, and accordingly I recommend that the legislation require the Appeal Tribunal make its decision accessible to the public in a manner which ensures the confidentiality of the parties to the appeal.

E. Medical Review Panels

1. General Comments

As noted previously, an aggrieved worker or employer (or, in the case of a deceased worker, the dependant) may bring an appeal to the Medical Review Panel ("MRP") from a medical decision rendered at any adjudicative level within the workers' compensation system. Under the current process, the length of time from the date a valid application is made to the MRP Department of the WCB, to the date the MRP renders its Certificate, is at least one year (and is often significantly longer). The MRP Certificate is then referred back to the WCB for implementation, which often takes several months and may lead to further appeals arising from the implementation decisions made by the WCB.

It is my recommendation that the formal appeal process to the MRP (currently set out in Sections 58 to 66 of the *Act*) be abolished. In its place should be a system whereby the Appeal Tribunal would have the discretion to refer a medical issue to a Panel of medical practitioners/specialists for an opinion.

The Royal Commission made a similar recommendation (#75) that the current MRP Department be replaced with a medical issues adjudicative branch under the administrative authority of the Appeal Tribunal. The Royal Commission summarized its rationale for this recommendation on page 59 of its *Final Report*:

> The complete administrative and geographic separation of medical appeals from the board would contribute to the actual and perceived independence of the panels. This could be accomplished by integrating the medical review process into the final level of appeal, thereby eliminating one level of appeal while profiting from administrative efficiencies (eg: common computer systems, flexible staff allocations).

2. Access to Medical Review Panels

As indicated above, it is my recommendation that the new MRP process should become part of the new external Appeal Tribunal. Access to the MRP would therefore only be available in those cases where a valid appeal has been commenced with the Appeal Tribunal. A referral of a medical issue to the MRP could be initiated in one of two ways:

(i) by a request from the affected worker (or, in the case of a deceased worker, his/her dependants) or the affected employer, or

(ii) by the Appeal Tribunal, on its own initiative.

With respect to the first method of referral (ie: a request by the affected worker, employer or dependant), the ultimate determination as to whether a referral should be made to the MRP would rest with the Appeal Tribunal Panel assigned to the particular appeal. In other words, the affected worker, employer or dependant would not be entitled to have its request for a referral automatically accepted. On this point, I recommend that the Appeal Tribunal enunciate the criteria it would consider in determining whether or not a request for a referral of a medical issue to the MRP by a party of interest should be accepted. For example, the criteria could include the following:

(i) the complexity of the medical issue in dispute,

(ii) the existence of a significant difference of opinion among the medical experts who have already considered the medical issue which is in dispute, and/or

(iii) the nature of the benefit or entitlement which is being sought in the appeal before the Appeal Tribunal. (For example, if the worker was seeking wage loss, with respect to a previously denied claim, for a relatively short period of time (such as, if he/she had returned to his/her pre-injury work after 2 or 3 months), or if the employer was seeking relief of costs pursuant to Section 39(1)(e) for a similar period of time, then I would not envision a referral to the MRP being made by the Appeal Tribunal.)

Sections 58(3) and (4) of the *Act* currently require the aggrieved worker or employer to submit a certificate from a physician certifying that, in the physician's opinion, there is a bona fide medical dispute to be resolved. In the new process that I have proposed, I do not believe that a physician's certificate (raising a bona fide medical dispute) should be a necessary prerequisite before a referral could be made by the Appeal Tribunal.

With respect to the Appeal Tribunal making a referral to the MRP on its own initiative, the Appeal Tribunal Panel should be entitled to do so whenever it believes such a referral is necessary. However, as observed previously under the heading "Powers of the Appeal Tribunal", the Panel would also have the authority to seek a medical opinion from a single medical practitioner or specialist without having to utilize the significantly more elaborate process which is involved in the referral of a medical issue to the MRP.

3. Determination of Issues and Non-Medical Facts

Since a referral to the MRP will be made by the Appeal Tribunal, the Panel assigned to the appeal should determine the medical issues upon which the MRP will be requested to provide an opinion. In other words, the issues currently specified in Section 61(1) of the *Act* would no longer be mandatory, but instead the Appeal Tribunal Panel would tailor the questions it wanted answered to meet the particular circumstances in the appeal before it.

It is also my recommendation that the Appeal Tribunal prepare a statement of the non-medical facts upon which the MRP must base its medical opinion. These non-medical facts would be determined by the Appeal Tribunal from several possible sources, including

(i) from adjudicative findings made previously with respect to the claim;

(ii) from facts the parties of interest may agree to (which, for example, could have been taken from their written submissions, or could have been specifically agreed to at a pre-conference hearing); or

(iii) from a preliminary hearing held by the Panel to specifically determine the relevant non-medical facts.

4. Appointment of Chairs and Specialists

Sections 58(1) and (2) of the *Act* read as follows:

(1) The Lieutenant Governor in Council may appoint, on the terms and conditions the Lieutenant Governor in Council establishes, one or more chairs of medical review panels, and an acting chair, who may act as chair whenever a chair is unable to act.

(2) The Lieutenant Governor in Council must appoint a medical committee which must prepare a list of specialists in particular classes of injuries and disabilities in respect of which workers have claimed compensation, which list may be amended from time to time, and may make provision for reimbursement of necessary expenses to members of the committee from the accident fund.

Order-in-Council ("OIC") #874, dated April 25, 1986, appointed the medical committee for the purposes of Section 58(2). The OIC states that the medical committee shall comprise the persons holding from time to time the positions of President of the BC Medical Association, Executive Director of the BCMA, and Registrar of the College of Physicians and Surgeons of BC. It is my understanding that concerns have been expressed with the role both the BCMA and the College of Physicians and Surgeons of BC have been required to fulfill with respect to picking and choosing specialists on a subjective basis. For example, the Royal Commission raised the following comment (on page 70 of its *Final Report*) concerning the BCMA:

> For example, it is unclear why the BCMA, the *de facto* trade union or advocate for medical practitioners in this province, should play a role in a process designed to make recommendations based on professional competency.

It is my further understanding that the medical committee specified in Section 58(2) was constituted in order to ensure that specialists were selected independently and impartially, given that the WCB administered the MRP process. However, based upon my recommendation that the MRP process should become part of, and be administered by, the external Appeal Tribunal, the necessity for such a medical committee loses its validity.

With respect to the appointment of Chairs of the MRPs, The Royal Commission recommended (on pages 69 and 70 of its *Final Report*):

(i) the Chairs should continue to be appointed by the Lieutenant Governor in Council as currently provided in Section 58(1);

(ii) the appointments should be for five year renewable terms;

(iii) the Lieutenant Governor in Council should be authorized to establish criteria, in consultation with the Chair of the Appeal Tribunal, with regard to establishing terms and conditions of appointments and administrative performance criteria; and

(iv) The Lieutenant Governor in Council should consider the renewal of Chairs having due regard to any recommendations of the Chair of the Appeal Tribunal pertaining to compliance with terms and conditions of appointment and administrative performance criteria.

However, with respect to the responsibility of preparing the list of specialists as currently contemplated by Section 58(2), the Royal Commission was of the view that this role could be fulfilled by the Chair of the Appeal Tribunal – as opposed to the Lieutenant Governor in Council. The Royal Commission addressed this point in its Recommendation #89 (on page 72 of its *Final Report*):

> The Chair of the Appeal Tribunal:
>
> a) in consultation with the medical community, including the College of Physicians and Surgeons of British Columbia and possibly the Dean of the Faculty of Medicine of the University of British Columbia;
>
> (i) establish and maintain a list of duly certified and licensed specialists in particular classes of injuries and disabilities in respect of which workers have claimed compensation; and
>
> (ii) establish terms and conditions of appointment and administrative performance criteria; and
>
> b) be authorized to periodically review and remove specialists from the list having regard to continuing qualifications, availability and compliance with terms and conditions of appointment and administrative performance criteria.

It is not readily apparent to me why the Chair of the new external Appeal Tribunal should be responsible for the preparation of the list of specialists – but not for the list of physicians to serve as Chairs. In my opinion, either the Lieutenant Governor in Council or the Chair of the Appeal Tribunal should be responsible for the preparation of both lists.

Based upon my recommendation that the MRP process should become part of, and be administered by, the external Appeal Tribunal, I believe it is appropriate for the Chair of the Appeal Tribunal to fulfill this responsibility. Accordingly, I make the following recommendations:

(1) With respect to the appointment of physicians to serve as Chairs of the Medical Review Panel process, the Chair of the Appeal Tribunal shall:

(i) in consultation with the medical community, including at a minimum the College of Physicians and Surgeons of British Columbia, establish and maintain a list of duly licensed physicians to be available to serve as Chairs of the Medical Review Panels, which list may be amended from time to time; and

(ii) establish terms and conditions of appointment and administrative performance criteria with respect to physicians who are appointed to serve as a Chair of a Medical Review Panel.

(2) With respect to the appointment of specialists for the Medical Review Panel process, the Chair of the Appeal Tribunal shall:

(i) in consultation with the medical community, including at a minimum the College of Physicians and Surgeons of British Columbia, establish and maintain a list of duly certified and licensed specialists in particular classes of injuries and disabilities in respect of which workers have claimed compensation, which list may be amended from time to time; and

(ii) establish terms and conditions of appointment and administrative performance criteria with respect to specialists who are appointed to serve on a Medical Review Panel.

5. The Constitution of a particular Medical Review Panel

Since access to the MRP process would become discretionary on the part of the Appeal Tribunal (as opposed to mandatory at the request of an aggrieved party), the number of MRP referrals should be significantly reduced under the new appeal structure I have proposed. Based on the anticipated complexity of the medical issues involved in those cases that are ultimately referred by the Appeal Tribunal, I believe that the MRP should continue to be constituted by three persons – a Chair of the MRP and two specialists.

The Chair of the MRP is currently chosen by the MRP Department of the WCB, while the two specialists are generally nominated by the affected worker and employer, respectively. However, this process cannot readily accommodate a scenario whereby the Appeal Tribunal wants to have two separate medical specialists represented on the MRP. (The existing legislation has been interpreted to require the WCB to constitute two separate MRPs if it believes the medical issues in dispute involve different specialties.) Furthermore, leaving the nomination of the specialists to the parties results in additional time delays in the overall appeal process.

It is therefore my recommendation that the Appeal Tribunal take the following steps with respect to the constitution of the MRP:

(i) The Appeal Tribunal would select the Chair of the MRP with respect to the particular referral.

(ii) The Appeal Tribunal would determine what specialties (either one or two) should be represented on the MRP, and then would select the appropriate physicians to the MRP from those specialties.

(iii) The Appeal Tribunal would advise the parties of interest of the names and relevant backgrounds of the Chair and the specialists selected to the MRP. The parties of interest would be given a brief period of time to raise any grounds of objection either may have to one or more of the selected physicians.

(iv) If any objection was upheld by the Appeal Tribunal, another physician would be selected as the Chair and/or specialist on the MRP. Once again, the Appeal Tribunal would advise the parties of interest of the name and relevant background of the new selection, and provide a further period of time for any objection to be raised.

Section 59(1) of the _Act_ currently specifies several circumstances which would exclude a specialist from being selected to the MRP in a particular claim. I recommend that these exclusionary grounds be retained with respect to the selection by the Appeal Tribunal of either the Chair or the specialists to an MRP.

If one of the members of the MRP is unable to proceed after his/her appointment to the MRP, the Appeal Tribunal Panel should have the authority to:

(i) have the MRP continue with only the remaining members, or

(ii) request a replacement be appointed to the existing MRP, or

(iii) constitute a new MRP.

6. Does the Worker need to be examined by the MRP?

Pursuant to Sections 58(3), (4) and (5), the affected worker must be examined by the MRP in each and every case. I do not believe that a mandatory requirement for the worker's examination is necessary in every case.

For example, an MRP referral occurred in a claim where the medical issue in dispute was whether a worker's particular cancer (multiple myeloma) could be caused by exposure to benzene (which the Appeal Division determined in the affirmative, thereby accepting the worker's application for compensation). Since the employer did not dispute the fact that the worker had been exposed to benzene during his employment, the only medical issue to be decided by the MRP was whether exposure to benzene could causally lead to the development of multiple myeloma. In these circumstances, it is difficult to comprehend how the examination of the worker would have any relevancy to the issue to be considered by the MRP.

Accordingly, it is my recommendation that it initially be left to the Appeal Tribunal Panel making the referral to determine whether, in the circumstances of the medical issue in dispute, it would be necessary for the worker to be examined by the MRP. However, the

MRP should retain the discretion to require the worker to be examined, notwithstanding the contrary determination by the Appeal Tribunal Panel. Refusal by the worker to attend a required MRP examination should have a direct consequence on the worker's entitlement to compensation benefits under the *Act*.

7. Should the Determination of the MRP be binding on the Appeal Tribunal?

The first sentence of Section 65 of the *Act* provides:

> A certificate of a panel under sections 58 to 64 is conclusive as to the matters certified and is binding on the board.

The Royal Commission recommended that the binding effect of the MRP's decision should remain in the legislation. The Royal Commission based its recommendation on the following rationale (on page 60 of its *Final Report)*:

> Having reviewed the submissions on this issue and considered the approach taken in other Canadian jurisdictions, the commission believes that medical determinations should be binding on and incorporated into the Appeal Tribunal's decision. A panel of independent physicians are in the best position to make medical determinations. If they are asked, no body, including the Appeal Tribunal, should be permitted to ignore their medical opinion.

In my opinion, the determination reached by the MRP should not be binding and conclusive on the Appeal Tribunal. Instead, the MRP determination would be part of the overall medical evidence to be considered by the Appeal Tribunal Panel, which would determine how much weight should be placed on the opinion. I base my recommendation on the following rationale:

(i) There have been occasions when a Certificate rendered by the MRP has not been consistent with the published policies of the WCB (such as in claims involving "activity related soft tissue disorders", or involving occupational diseases which are listed on Schedule B). Furthermore, it is my understanding that some MRPs do not always agree with the medical conclusions set out in the WCB's published policies, and do not believe they are bound to follow such policies.

This is a serious concern. All aspects of the workers' compensation system – including the MRPs – must be bound by the applicable policies adopted by the governing body of the WCB. Otherwise, there would be a two-tier system of adjudication with respect to claims involving the same medical issue – those claims which would be decided by WCB Officers or the Appeal Tribunal based upon the applicable policies of the WCB, and those that would be determined by the MRP based solely upon its medical findings. I believe such a two-tier system is both unfair and unacceptable.

This problem would not exist if the MRP's determinations are not binding and conclusive. The MRP would be free to reach any medical findings it felt appropriate, and the Appeal Tribunal would be responsible for considering and applying the MRP's determination within the parameters of the published policies of the WCB.

(ii) In claims involving multi-causal occupational diseases (such as lung cancer arising from cigarette smoking and occupational exposures), there have been MRP Certificates which state that the occupational exposures were the less significant of the two causes, but were still of some "causative significance" in the development of the worker's disease. The term "causative significance" from a medical perspective may not necessarily be the same standard as is required to accept a worker's application for compensation benefits. Once again, the Appeal Tribunal will be in the best position to determine how the medical findings of the MRP should be applied within the context of a worker's compensation claim.

(iii) The Appeal Tribunal will obviously have the capability and experience to weigh medical evidence and to make medical determinations. In fact, in the vast majority of cases, the Appeal Tribunal will make such medical determinations without any referral being made to the MRP.

Accordingly, in the vast majority of cases, the Appeal Tribunal will be reaching the final and conclusive determination on all medical and non-medical issues before it. I see no compelling reason to divorce one type of issue (ie: a medical determination made by the MRP) from the overall authority of the Appeal Tribunal.

(iv) Finally, as I indicated earlier, it will be the responsibility of the Appeal Tribunal Panel to determine how much weight should be placed on the MRP's medical findings. However, I envision that the weight to be given to the MRP findings would, in most cases, be substantial. I base my belief on the following two factors – it was the Appeal Tribunal Panel itself which determined that a referral to the MRP should be made in the particular case, and the MRP would be constituted with three physicians/specialists who are independent from the WCB and the parties of interest.

8. Powers of the MRP

Sections 61(4), (5) and (6) of the current legislation provide the MRP with the following powers:

(i) The MRP may receive and accept the evidence that in its discretion it may think fit and proper and essential to the medical problem to be decided.

(ii) The MRP must determine its own procedure.

(iii) The MRP has the like powers as the Supreme Court to compel the attendance of witnesses and examine them under oath; to compel the production and inspection of books, papers, documents and things; and to cause depositions of witnesses residing in or out of the Province to be taken.

Certainly the MRP must have broad discretion to determine its own medical procedures with respect to any referral made to it by the Appeal Tribunal. However, I do not believe it is appropriate to provide the MRP with any of the other powers set out above.

With respect to "receiving and accepting any evidence the MRP may think fit and proper and essential", as I stated previously it should be the responsibility of the Appeal Tribunal to determine the non-medical facts upon which the MRP must base its medical findings. If the MRP determines that it requires further non-medical facts to reach its determination, the MRP would be required to request the Appeal Tribunal to provide such further information.

If, on the other hand, the MRP required further medical information in order to reach its determination (such as obtaining an undisclosed medical report from a specialist whom the worker had previously seen, or referring the worker to have an up-to-date x-ray taken), the MRP should have the authority to directly obtain such information. However, the MRP would be required, when rendering its findings, to disclose all of the additional medical information upon which it relied to the Appeal Tribunal.

The MRP should not be provided with the like powers of the Supreme Court (to compel the attendance of witnesses, etc.). The MRP will be conducting a medical inquiry – it will not be exercising an adjudicative function. (As discussed previously, since the MRP's medical findings would not be conclusive and binding, the responsibility for ultimately adjudicating the medical issue in dispute will rest with the Appeal Tribunal.) If the MRP believes it needed to compel the production of documents, etc. in a particular case, it would refer the matter back to the Appeal Tribunal Panel to determine whether an order should be made compelling the production of the documents.

Finally, there have been occasions when the worker has attended the MRP with legal (or other formal) representation, or when formal written submissions were presented to the MRP on behalf of the worker. In such circumstances, issues of procedural fairness and natural justice will arise. In my opinion, since the MRP process I have proposed would not be adjudicative in nature, a worker who is to be examined by an MRP should not be entitled to attend with representation, or to have any written submissions presented to the MRP on his/her behalf. (When I refer to "representation", I do not intend to include a family member or close personal friend who attends the MRP examination with the worker. Since the examination by three physicians who are unknown to the worker can be a daunting, if not unnerving, experience, the worker should be entitled to be accompanied by someone who is personally close to him/her – such as a family member or close friend.)

In those cases where an interpreter may be required to attend the MRP with the worker, it should be the Appeal Tribunal which makes the necessary arrangements for the interpreter to attend. Due to the privacy concerns which may arise should a professional interpreter be required to attend the physical examination of the worker, I would envision the Appeal Tribunal arranging for a family member or close personal friend to be the interpreter in those cases where it is appropriate to do so.

9. Written Reasons to be provided by the MRP

Section 61(1) of the *Act* requires the MRP to render a Certificate which answers the questions specified in the legislation. Pursuant to Section 61(2), the MRP may also make a report and recommendations to the WCB on any matter arising out of the examination and review.

It is my recommendation that the MRP should no longer be required to provide a Certificate which simply answers the questions raised by the Appeal Tribunal Panel, without explaining the basis of the MRP's findings. Instead, the MRP should be required to provide written reasons which adequately respond to the questions raised by the Appeal Tribunal Panel.

Finally, I agree with Recommendation #82 found on page 66 of the Royal Commission's *Final Report*, which would require the MRP to prepare, separate from its report to the Appeal Tribunal, a narrative outlining any health matters the MRP discovers which are unrelated to the claim. The MRP would be required to send this additional narrative directly to the worker's treating physician. A copy of this additional narrative would not be provided by the MRP to the Appeal Tribunal or to the WCB.

10. Time Limits for the MRP Process

I have considered the issue as to whether the legislation should specify a time frame within which the MRP must render its medical findings once a referral has been made to it by the Appeal Tribunal. However, since the physicians/specialists on the MRP would be outside the direct control of the Appeal Tribunal (since they are not employed by the Appeal Tribunal), the ability to meet and enforce such time frames may prove to be difficult.

Accordingly, I agree with the following comment raised by the Royal Commission on page 75 of its *Final Report*:

> Rather than set specific time limits that may have to be extended in defined circumstances, the Appeal Tribunal should have the clear mandate to ensure the timeliness of the medical issues review process.

Generally speaking, I believe that the whole MRP process (ie: from the date the Appeal Tribunal decides it will refer a medical issue to the MRP, to the date that the MRP provides its written reasons to the Appeal Tribunal) should be completed within 90 days. It will be incumbent upon the Appeal Tribunal to appoint physicians/specialists to the MRP who are able to meet this time frame in the particular case before it. There obviously will be some MRP referrals when this 90 day time frame may need to be extended. However, the Appeal Tribunal Panel should retain the ultimate authority to determine that the MRP process is taking an unduly long period of time to complete, and therefore will be abandoned in the particular appeal before the Appeal Tribunal. In such circumstances, the Appeal Tribunal Panel would be required to reach its determination on the medical information which is available to it.

Finally, I previously recommended that the Appeal Tribunal should be required to render its decision within 180 days from the date the appeal was commenced. However, the impact which a referral to the MRP will have on this 180 day period must obviously be taken into account. It is therefore my recommendation that the 180 day time frame, within which the Appeal Tribunal's decision must be rendered, be frozen from the date the Appeal Tribunal Panel determines it will refer a medical issue to the MRP, until the date that the MRP's medical findings are received by the Appeal Tribunal.

Once the Appeal Tribunal receives the MRP's medical findings, the written reasons (as well as any new medical information obtained by the MRP) should be provided by the Appeal Tribunal to the parties of interest in the appeal, who would be provided a brief opportunity to make any written submissions arising from the MRP's findings. Since the Appeal Tribunal's 180 day period to render its decision would once again be running at this time, the time frame, in which the parties of interest would be provided the opportunity to respond, should be no longer than 7 – 10 days. Although the comments raised by any party of interest would be provided to the other parties of interest, I do not envision any opportunity to reply being given to the parties (since they are not being invited to provide new evidence in response to the MRP's findings – but are only being requested to raise any comments the party may have arising from the MRP's findings).

F. An Alternative Appellate Structure?

A number of concerns have been raised in regard to my recommendation that the appellate structure within the BC workers' compensation system consist of two levels – the WCB's internal review process and the external Appeal Tribunal. The most significant concerns relate to the following issues:

(i) the perceived replacement of two existing levels of appeal (the Review Board and the Appeal Division) with the same number of levels of appeal (the internal review process and the external Appeal Tribunal);

(ii) the duplication of efforts and costs by having two levels of appeal, particularly if the standard of review at both levels is substitutional as opposed to supervisory; and

(iii) the time frame involved for a matter to proceed through the two levels.

I will first respond to the above concerns. I will then set out my thoughts with respect to several potential alternatives to the appellate structure I have recommended.

1. The replacement of the Review Board and Appeal Division with the internal review process and the external Appeal Tribunal

In my opinion, one cannot reasonably compare the proposed internal review process with either the existing Review Board or Appeal Division levels of appeal. Simply stated, there is a qualitative difference between a first level review process which is internal to the WCB, and the more formal appellate process represented by both the Review Board and the Appeal Division.

As discussed previously, the internal review process is intended to be a simplified and flexible process for the WCB to apply "corrective justice" to its own decisions in a timely manner. The formal trappings of law associated with a "quasi-judicial" proceeding would not be applicable to the internal review process, since there would be a second, external level of appeal that can rectify any "procedural fairness" concerns arising from the utilization of the internal review process. However, the requirements for "procedural fairness" are a significant aspect of both the Review Board (since it is the existing external level of appeal within the BC workers' compensation system) and the Appeal Division (since it is, generally speaking, the final level of appeal).

I would also note that every other jurisdiction in Canada has an internal level of appeal within its WCB, followed by a second level of appeal to an external tribunal – with the exceptions of Saskatchewan (which currently has two levels of internal appeal, but is considering the establishment of an independent avenue of appeal) and New Brunswick (which has only one external level of appeal). This consistent pattern across Canada clearly reflects my own view that the WCB must have a process which allows it to rectify its own errors before the matter is considered by an external appellate tribunal.

2. The duplication of efforts and costs

If one simply focuses on the "appellate" function to be exercised by the internal review process, there is certainly some duplication of efforts between the internal review process and the external Appeal Tribunal, particularly when both levels will generally have the ability to exercise substitutional authority with respect to the matters before them. However, the internal review process is intended to fulfill a much broader role than simply being an appellate body. As discussed previously, the internal review process will be an essential component of the WCB's overall quality assurance strategy. This is a role that cannot be fulfilled by an appellate tribunal which is external to the WCB, or which exercises the final level of appellate authority within the workers' compensation system.

Even if one does focus on the overlapping appellate function of the internal review process and the external Appeal Tribunal, as discussed above the "corrective justice" approach of the former process is intended to be qualitatively different than the "natural justice" expectations associated with the latter external process.

With respect to costs, I do not perceive that there will be significant duplication. If the *Act* did not provide for an internal review process, the WCB would still be required to develop and staff an enhanced quality assurance program, which would presumably involve the expenditure of costs that would otherwise have been allocated to the internal review process.

Furthermore, the ability of the WCB to correct its own adjudicative mistakes through the internal review process must, by necessity, result in a reduction of appeals that would otherwise have been appealed to the external tribunal for such rectification. A greater volume of appeals to the external tribunal, in the absence of an internal review process, would presumably require greater staffing needs (ie: greater costs) at the external level of appeal.

3. The time frame to proceed through the two levels of appeal

A concern has been raised with respect to the length of time it will take a matter to proceed through both the internal review process and the external Appeal Tribunal. I will respond to this concern by referring to a very simplified depiction of the amount of time a matter could take to proceed through the existing, and the proposed, appellate systems. I have excluded from my consideration the potential of an extension of time being granted, and the potential of the matter being referred to the MRP under either the existing or the proposed appellate systems. Finally, I will base my comparison from the date an appeal is commenced by an affected party from an initial decision rendered by the WCB (since it is the appellant who determines when he/she will initiate the appeal).

(a) Existing Appellate System

▪ Time frame between the submission of Part 1 of the Notice of Appeal to the rendering of the decision by the Review Board	18 months (Note: there is no existing statutory time frame within which the Review Board must render its decision. Accordingly, an estimate of the median time frame has been taken from the Review Board's 2000 Annual Report.)
▪ Statutory time frame to commence an appeal to the Appeal Division	1 month
▪ Statutory time frame for the Appeal Division to render its decision	3 months
Total time frame:	22 months

(b) Proposed Appellate System

▪ Statutory time frame for the internal review process to render its decision	5 months
▪ Statutory time frame to commence an appeal to the external Appeal Tribunal	1 month
▪ Statutory time frame for the Appeal Tribunal to render its decision	6 months
Total time frame:	12 months

As indicated above, the proposed appellate system should result in a significant reduction of time (of 10 months) from what currently exists. In my opinion, the proposed simplified time frame of approximately 12 months (from the commencement of the application to the internal review process to the rendering of a decision by the external Appeal Tribunal) is not unreasonable to ensure that any entitlements or obligations under the *Act* are correctly determined.

4. Alternate Appellate Structures

I have recommended that the proposed statutory appellate system consist of an internal review process within the WCB and an external Appeal Tribunal. For the most part, each level would exercise substitutional authority over the matters before it. (There are some issues with respect to which the internal review process' scope of review would be limited to supervisory, and which could not be subsequently appealed to the Appeal Tribunal.) I will now comment upon the following 5 potential alternate appellate structures, focusing upon the reasons why I would not recommend their adoption:

(a) Internal Review Process (exercising substitutional authority), followed by External Appeal Tribunal (exercising supervisory authority);

(b) Internal Review Process (exercising supervisory authority), followed by External Appeal Tribunal (exercising substitutional authority);

(c) Internal Review Process, followed by External Appeal Tribunal (both exercising supervisory authority);

(d) one level of Internal Review Process only (exercising substitutional authority); and

(e) one level of external Appeal Tribunal only (exercising substitutional authority).

(a) Internal Review Process (substitutional)/External Appeal Tribunal (supervisory)

As previously discussed, an appeal to the external Appeal Tribunal will provide the only opportunity for the appellant to express his/her dissatisfaction with a WCB decision to a body which is external from the WCB. There are several concerns which may arise if the external Appeal Tribunal is limited to exercising only supervisory authority over the WCB decisions which are appealed to it.

First, the Appeal Tribunal may identify issues which, although they may not constitute an error of law or contravention of published policy, the Tribunal believes were wrongly decided based upon the circumstances of the case before it. The Appeal Tribunal could attempt to find some way to correct the error, seeking some justification to fit within the limited supervisory authority it has been granted. Or it could identify what it perceives to be the error made by the WCB, but refuse to correct it due to its limited supervisory role. This latter scenario would, in my view, be most destructive to the credibility of the WCB itself, and to the worker's compensation system as a whole. In particular, the appellant's level of dissatisfaction, frustration and anger with the system would substantially increase, since he/she would be advised by the Appeal Tribunal that the WCB's determination was wrongly decided, but cannot be corrected.

Second, as is often the case within the existing appellate system, the appellant could seek to present new evidence to the Appeal Tribunal which is intended to support the merits of his/her appeal (such as a new medical opinion from a specialist). However, as a general rule, a tribunal exercising a supervisory power of review would not have the authority to consider the new evidence. Once again, this would lead to increased dissatisfaction, frustration and anger on the part of the appellant, who would tend to view his/her appeal rights to the Appeal Tribunal as being hollow.

Third, appellants, who believe they were wronged by the WCB and are subsequently advised that the one avenue for an external review only has limited authority over the WCB's decisions, will tend to seek other outlets to express their dissatisfaction, frustration and anger. These outlets would include their MLA's, the Provincial Ombudsman, the media and the Courts.

(b) Internal Review Process (supervisory)/External Appeal Tribunal (substitutional)

This alternative makes little sense from the perspective that the WCB would not be provided with the authority to correct many of the errors it might identify. The internal review process would simply become a stepping stone which the appellant must access before proceeding to the external Appeal Tribunal, which would have the substitutional authority to rectify the error. This "flow through" system would add to the frustrations experienced by the participants and would, in my view, have a significant detrimental impact on the credibility of the WCB.

For example, an appellant may seek to present new medical evidence at the internal review level to support his/her appeal. The Review Manager would generally be unable to consider this new evidence due to his/her limited supervisory authority. However, the external Appeal Tribunal, exercising substitutional authority, would be entitled to consider and act upon the new evidence.

Finally, if the internal review process is not provided the substitutional authority to correct any identified errors made by the WCB's initial decision-makers, then this initial level of appeal would likely have little impact on reducing the volume of appeals going from the WCB to the external Appeal Tribunal.

(c) Internal Review Process/External Appeal Tribunal (both supervisory)

This alternative would combine the negative features of both of the above two alternatives, since neither the internal review process nor the external Appeal Tribunal would have the necessary substitutional authority to consider relevant new evidence, or to rectify any identified errors made by the initial decision-makers within the WCB.

(d) Internal Review Process only (substitutional)

The primary concern with this alternative is that dissatisfied parties would have no external appellate process within the workers' compensation system which they can access in order to seek relief from what they perceive to be an unfair and unreasonable decision made by the WCB. Dissatisfied parties often exhibit strong feelings of distrust towards the WCB, and need an external avenue to express their concerns. If the worker's compensation system does not provide that external avenue, the dissatisfied parties will seek such an outlet elsewhere (ie: their MLA's, the Provincial Ombudsman, the media or the Courts).

(e) External Appeal Tribunal only (substitutional)

The primary concern with this alternative is that the workers' compensation system would be deprived of the significant advantages associated with the internal review process, as discussed previously. These advantages include:

(i) the essential role the internal review process would play within the WCB's overall quality assurance strategy;

(ii) the ability for the WCB to enhance consistency and predictability within its decision-making process;

(iii) the ability for the WCB to identify and correct errors made at the initial decision-making level; and

(iv) the reduction of the volume of appeals that would be brought from the WCB to the external Appeal Tribunal.

5. Is there a viable alternate appellate structure?

At the outset to responding to the above question, I must emphasize that I am not prepared to recommend any of the above five alternatives in lieu of the appellate structure which I have proposed in this Report. All five alternatives raise significant concerns which I believe would become problematic for the worker's compensation system in BC.

However, if I was required to identify the one alternative which I believed to be the least problematic, the option I would choose would be the last alternative I raised – the external Appeal Tribunal only, exercising substitutional authority (with some specified issues, as previously recommended elsewhere in this section of the Report, being limited to a supervisory scope of review).

I believe it is imperative that the workers' compensation system in BC provide an opportunity for an appellant to have his/her appeal heard by a tribunal which is external to, and independent from, the WCB, and which has broad authority to rectify those errors it identifies as having been made by a decision-maker within the WCB. Any appellate structure which does not include such an external tribunal will, in my opinion, result in the following adverse impacts:

(i) there would be significant loss of credibility in the workers' compensation system by those parties who are dissatisfied with, and/or who distrust, the WCB, and

(ii) there would be increased venting of the dissatisfied parties' frustration and anger to outlets which are outside of the workers' compensation system.

G. The Rights of an Estate

There are three questions I will be addressing in this section:

(1) Should the estate have standing to initiate or continue an appeal on behalf of a deceased worker?

(2) Should the estate have standing to initiate an application for compensation on behalf of a deceased worker?

(3) Should the estate have standing to receive compensation benefits on behalf of a deceased dependant?

1. Standing of the Estate to initiate or continue an appeal

In Decision #95-0991 (1995), 11 WCR 507, The Appeal Division considered the issues as to whether an estate has standing:

(i) to continue an appeal before the Review Board that was initiated by the worker before his death, and

(ii) to initiate an appeal of a Review Board finding to the Appeal Division on behalf of the deceased worker.

After reviewing a number of sources, including the common law, American jurisprudence, Ontario compensation appeal decisions, the published policies of the WCB, and the relevant provisions of the BC Workers Compensation Act and the Estates Administration Act, the Panel (chaired by the former Chief Appeal Commissioner) reached the following conclusions (on page 518):

- the estate of a deceased worker has standing to continue an appeal initiated by the worker to the Review Board concerning a claim for arrears of compensation;
- the estate of a deceased worker has standing to initiate an appeal, to the Appeal Division, of Review Board findings concerning a claim for arrears of compensation.

The Royal Commission considered the topic of "Rights of a Worker's Estate" in Volume I, Chapter 9 (entitled "Compensation and Assessment Appeals") of its Final Report, on pages 87 to 89. After reviewing Appeal Division Decision #95-0991, supra, the Royal Commission reached the following conclusion (on pages 88 and 89):

> The commission adopts a general principle that the benefits the estate may be able to claim initially or be granted on appeal would be those that normally would have accrued to the worker prior to his death. Our primary concern, however, is that the Act should be amended so that it is clear that the death of a worker does not extinguish the rights of the estate to file or pursue claims, including rights of appeal, as if the worker were still alive. A calculation of the applicable compensation benefit would, of course, end on the date of the worker's death.

Accordingly, the Royal Commission recommended the *Act* be amended:

> To ensure that the death of a worker does not extinguish the right of the estate of the deceased worker to stand in the worker's shoes and:
>
> (a) file a claim or pursue a claim already filed, or
>
> (b) file an appeal or pursue an appeal already filed for compensation benefits under the Act that would have accrued to the worker until his death.

I am in agreement that the estate should have standing to initiate or continue an appeal for compensation benefits on behalf of the deceased worker. It is clear, in these circumstances, that the worker had unequivocally demonstrated his/her intention to seek compensation benefits, since the worker would have commenced the application for compensation with the WCB prior to his/her death. Accordingly, any entitlement which the worker had to receive compensation benefits, pursuant to the provisions of the *Act*, had already accrued to the worker prior to his/her death. For example, if the worker's claim had been accepted by the initial decision-maker, but the worker had died before any temporary wage-loss payments had been made by the WCB, it is my understanding that the accrued wage-loss entitlement would be provided to the worker's estate.

Once the application for compensation has been brought by the worker, there is no valid reason why the estate should not be entitled to continue the claim, on behalf of the worker, until a final determination is reached through the appellate system.

2. Standing of the Estate to initiate an application for compensation

As will be noted from the above excerpt, the Royal Commission did not differentiate in its reasoning between the right of an estate to initiate an application for compensation on behalf of a deceased worker, as opposed to the estate's right to follow through with a claim that had been initiated by the worker prior to his/her death. However, in my opinion there is a critical distinguishing factor between these two situations.

In the latter circumstances, the worker had clearly demonstrated his/her intent to seek compensation benefits prior to his/her death. In the former, no such demonstrable intention exists. Is this distinguishing factor sufficient to deny the estate any standing to initiate an application for compensation on behalf of the deceased worker? In my opinion, the answer is no.

When a worker suffers a disability arising from a work-related injury or illness, the worker has an entitlement to receive compensation benefits pursuant to the applicable provisions in the *Act*. However, there are procedural requirements specified in the *Act* which the worker must meet in order to crystallize his/her entitlement to compensation benefits. For example, pursuant to Section 53(1) of the *Act*, the worker must notify his/her employer "as soon as practicable" after the occurrence of an injury or disabling occupational disease. Similarly, Section 55(2) provides, as a general rule, that an application for compensation must be filed within one year after the date of injury, death or disablement from occupational disease.

If a worker is disabled by a work-related injury, but dies before the expiry of the one year period specified in Section 55(2), why should the estate not be able to "stand in the worker's shoes" (as per the Royal Commission's recommendation)? In responding to this question, consider the following hypothetical circumstances:

> A worker suffers severe head injuries as a result of a work-related accident, which requires immediate hospitalization and extensive surgical intervention. The worker's cognitive abilities are severely affected, and he has no recollection of the circumstances leading to his injuries. Two months after the accident, the worker, who has remained in hospital throughout this period, dies from complications associated with his injuries. The employer did not report the injury to the WCB, nor did the worker submit an application for compensation.

In the above circumstances, the worker was clearly not in a position to bring an application for compensation, on his own motion, prior to his death. What merit is there in denying the estate the right to initiate the application for compensation benefits on behalf of the deceased worker for the two month period between the date of the worker's accident and the date of his death?

In my opinion, the estate should be entitled to "stand in the shoes" of the deceased worker. For example, if the estate initiates an application for compensation within one year of the date of the deceased worker's injury or disablement from occupational disease, there would be no timeliness issue with respect to the application (since the worker, but for his/her death, would have been entitled to commence the application within the one year period). If the estate's application on behalf of the deceased worker was brought after one year from the date of the worker's injury or disablement from occupational disease, but less than three years, then the estate would need to comply with Section 55(3) and establish that there were "special circumstances" which precluded the worker from filing the application within the one year period. In other words, the same onus which would have been on the worker (to establish special circumstances), had he/she not died, must be met by the estate which is standing in the shoes of the deceased worker. (Section 55(3.1) would have no application to an estate since any benefit entitlement would start on the date the application for compensation is received by the WCB. Since the worker's death would have preceded the date of any application brought by the estate pursuant to Section 55(3.1), the deceased worker would not have any entitlement to benefits as of the date of the estate's application.)

Although I do believe that an estate should have the right to initiate an application for compensation on behalf of a deceased worker, I recommend the *Act* specify that such an application by the estate must be brought within one year of the worker's death, with no discretion for the time frame to be extended. I base this recommendation on the following two reasons:

(i) There should be finality with respect to the estate's right to apply for compensation benefits on behalf of the deceased worker.

(ii) I perceive the concept of "special circumstances", as utilized in Sections 55(3) and (3.1), as being personal to the worker. I do not believe it is appropriate to extend this concept to permit an estate to commence an initial application for compensation beyond a reasonable time frame – which I have recommended to be one year from the date of the worker's death.

Finally, there is a related issue concerning the estate's ability to initiate an application for reconsideration on behalf of a deceased worker, pursuant to Section 96(2) of the *Act*, with respect to a previous decision rendered by the WCB. This issue does give me cause for great concern, since there would be no time limit placed on the estate's right to bring such an application. For instance, an estate could seek a reconsideration of a WCB decision, rendered 40 or 50 years earlier, denying a worker's application for compensation. If successful, the estate would be entitled to receive compensation benefits on behalf of the deceased worker retroactively from the date of the impugned WCB decision to the date of the worker's death.

In such circumstances, there would never be any finality to any WCB claim, since the estate of a deceased worker would always have the opportunity to seek a reconsideration of what it considered to be a "wrong" decision. In order to prevent this result, I would recommend, if I had to, that the *Act* expressly preclude an estate from initiating an application for reconsideration on behalf of a deceased worker. However, I do not believe such a provision is necessary, since I have previously recommended that the WCB's authority to reconsider a previous decision, pursuant to Section 96(2), be removed from the *Act*. In such circumstances, neither a worker nor a worker's estate would have any entitlement to seek a reconsideration of a decision rendered by the WCB.

3. Standing of the Estate to receive compensation benefits on behalf of a deceased dependant

In those cases where the *Act* provides an entitlement to compensation benefits to a dependant of a deceased worker (as opposed to there being a discretion on the part of the WCB to provide compensation benefits to a dependant), it is my recommendation that the estate of a deceased dependant should be entitled to

(i) initiate or continue an appeal for compensation benefits on behalf of the deceased dependant, or

(ii) initiate an application for compensation benefits on behalf of the deceased dependant, provided that the application is commenced by the estate within one year from the date of the dependant's death.

The rationale for the above recommendation is the same as discussed previously with respect to the rights of an estate of a deceased worker. I see no difference concerning the rights of an estate to "stand in the shoes" of a deceased dependant, as opposed to a deceased worker, in those cases where the *Act* provides an entitlement for the dependant to receive compensation benefits in the event of the death of a worker.

Chapter 4: POLICY ISSUES

A. Overview

The existing legislation places considerable emphasis on the concept of "policy". Pursuant to Section 82, the Governors (currently the Panel of Administrators) have the mandatory responsibility to "approve and superintend the policies and direction of the board, including policies respecting compensation, assessment, rehabilitation and occupational health and safety".

Section 84(3) defines the duties of the President of the WCB, which include:

(i) implementing the policies of the Governors with respect to administration of the WCB, and

(ii) being responsible for all functions related to staff (other than appeal commissioners), in accordance with the policies of the Governors.

Several provisions with respect to the Appeal Division similarly refer to the policies of the Governors. For example, Section 85(1)(b) provides that the Chief Appeal Commissioner will appoint the Appeal Commissioners, who are selected in accordance with the policies established by the Governors. Section 85(7) requires the Chief Appeal Commissioner to implement the policies of the Governors with respect to the administration of the Appeal Division. Section 85.1 states that the Chief Appeal Commissioner may determine the practice and procedure for the conduct of appeals by the Appeal Division, subject to any policies of the Governors.

Furthermore, there are several provisions in the *Act* which require grounds to be met in order for an appeal to be brought to the Appeal Division. These grounds of appeal include "a contravention of a published policy of the governors". (See Sections 96(4), 96(6) and 96(6.1).)

In my opinion, the new Board of Directors should retain the ultimate responsibility for the creation and approval of policies that will be applicable within the BC workers' compensation system. In this section of my Report, I will address several issues associated with the concept of "policy".

B. What is "Policy"?

The *Workers Compensation Act* establishes the applicable framework that is intended to be legally binding on the decision-makers within the workers' compensation system in BC. However, it is not practicable (nor, in my view, possible) for the *Act* to contain detailed provisions which attempt to anticipate every situation that could potentially arise. Accordingly, the WCB itself must have the responsibility and authority to establish policies which will provide direction and guidance with respect to how situations that may arise should be handled.

Decision No. 86 of the Governors (1994), 10 WCR 781 identifies what constitutes the "published policies" of the Governors:

(i) the Assessment Policy Manual, the Prevention Manual (as well as the remaining applicable policies in the Occupational Safety and Health Division Policy and Procedure Manual), and the Rehabilitation Services and Claims Manual (including any amendments made to these policy Manuals approved by the Governors);

(ii) Workers Compensation Reporter Decisions No. 1-423 (subject to those decisions which have been "retired" pursuant to Resolution #2000/03/16-03 of the Panel of Administrators, found at (2000), 17 WCR 67);

(iii) the Classification and Rate List, which sets out the classification structure and assessment rates for industries within the scope of Part 1 of the *Act*; and

(iv) any documents published by the WCB that are adopted by the Governors as published policies, and all decisions of the Governors declared to be policy decisions.

As noted previously, the *Act* refers to both the "policies" and the "published policies" of the Governors. The *Act* does not currently contain any definition with respect to either of these terms. Accordingly, it is not entirely clear whether these two terms were intended to have the same or different meanings within the context of the provisions in which they are used. In my view, the two terms were intended to be of similar effect.

It is my recommendation that the *Act* be amended to include a very simple definition of the term "published policy", such as "any document or decision which is declared by the Board of Directors to constitute published policy". It will then be the responsibility of the Board of Directors to determine what should be declared to be its published policy, as is currently the case with the documents specified in Decision No. 86 referred to above. I also recommend that the *Act* be reviewed, and whenever the phrase "the policies of the Governors" is used, it should be replaced with "the published policies of the Board of Directors".

The Board of Directors will need to ensure that its "published policies" are in fact published. This objective can be achieved by having the decisions of the Board of Directors, which are adopted as "published policy", made accessible to the public – such as through the *Workers' Compensation Reporter* series and/or the WCB website.

C. To whom would the Published Policies of the Board of Directors apply?

In my opinion, the answer to the above question is that the published policies of the Board of Directors would apply to all decision-makers within the workers' compensation system in BC, including the external Appeal Tribunal. It makes absolutely no sense to require the decision-makers within the WCB (ie: the initial decision-makers and the Review Managers at the internal review level) to apply the published policies of the

Board of Directors, and then to permit those decisions to be reviewed by the external Appeal Tribunal based on different considerations. When it comes to the applicability of the published policies of the Board of Directors, the workers' compensation system must be viewed as a whole.

Since the external Appeal Tribunal will be independent from the WCB, it would theoretically not be required to apply the published policies of the Board of Directors should the *Act* remain silent on the point. Accordingly, it is my recommendation that the legislation specifically state that the Appeal Tribunal must consider and apply the published policies of the Board of Directors which are applicable to the determination of the appeal before it.

D. Are the Published Policies of the Board of Directors "Binding"?

The existing policy of the WCB, as found in Section #96.10 of the Claims Manual, would suggest that decision-makers are not "bound" by published policy when adjudicating individual claims. The following is stated on pages 12-19 and 12-20 of the Claims Manual:

> In the adjudication of individual claims, the Board is not "bound" by either internal policy directives or by external authorities in the field of compensation, at least not in the sense of the word "bound" as understood at common law. However, in issuing internal directives, the Board gives general indications of how it will act when certain circumstances come before it. When these circumstances arise, the applicable directive will normally be followed. It is recognized that there is an infinite variety of circumstances that can arise and that it is not possible to lay down in advance policies to finally determine every conceivable situation. Furthermore, there is the obligation on the Board to decide each case in accordance with its merits and justice and the right of individual persons affected under the rules of natural justice to present argument and evidence on their own behalf. Therefore, regard must always be had to the particular circumstances of each claim to determine whether an existing policy should be applied or whether there are grounds for a change in or departure from a policy. There will also be situations arising from time to time which are not covered by existing policy.
>
> Board officers making decisions on claims are generally required to follow Board policies which are applicable to a claim before them. If they feel that a change in, or departure from a policy would be desirable, or they can find no applicable policy, they may refer the matter, with the approval of their Manager, to the Director of their department or the Director's delegate.

In my opinion, the above excerpt is confusing with respect to whether or not published policy should be considered as "binding". On the one hand, the opening sentence states that the WCB is not "bound" by its internal policy directives when adjudicating individual claims. On the other hand, the opening sentence to the second paragraph specifies that WCB Officers making decisions on claims are generally required to follow WCB policies which are applicable to a claim before them.

A similar confusion is contained in the *Act* itself. *Section 99 provides that the* WCB is not bound to follow legal precedent, and its decision must be given according to the merits and justice of the case. This provision leaves the impression that decision-makers are not bound to follow WCB policies when determining the "merits and justice of the case".

On the other hand, one of the grounds of appeal specified in Sections 96(4), 96(6) and 96(6.1) is "a contravention of published policy of the governors". If decision-makers were not "bound" to apply the WCB's published policies, why would the contravention of such a policy justify an appeal being brought to the Appeal Division?

In my opinion, all decision-makers within the workers' compensation system in BC must consider and apply the published policies of the Board of Directors which are applicable to the determination of the matter before them. Otherwise, why have such policies in the first place? The impediment to achieving this objective would appear to be the requirement in Section 99 of the *Act* that the decision of the WCB "must be given according to the merits and justice of the case". Accordingly, it is my recommendation Section 99 be revised to clearly specify that all decision-makers within the WCB must, when determining the merits and justice of the case, consider and apply the published policies of the Board of Directors which are applicable to the matter before them.

E. The Role of the Policy Bureau

As indicated previously, the ultimate responsibility for the creation and approval of the published policies that will be applicable within the BC workers' compensation system must lie with the Board of Directors. At the present time, the WCB's Policy Bureau is responsible for providing the necessary assistance requested by the Panel of Administrators in fulfilling its role with respect to the creation and approval of policy.

The Panel of Administrators' Manual, Chapter 7 (entitled "Terms of Reference for the Director General, Policy Bureau") describes the mandate of the Policy Bureau in Paragraph #I(B):

> The Policy Bureau's mandate is to ensure that the Panel is provided with thoroughly researched "public interest" policy and regulatory alternatives and options which incorporate the views of the major constituents (workers, their unions, employers and the WCB administrative operating divisions).

The Policy Bureau is currently headed by the Director General, who reports to the Panel of Administrators through the Chair of the Panel.

It is my recommendation that the Policy Bureau should remain in existence. In order to fulfill their statutory responsibility with respect to the approval of the WCB's published policies, the Board of Directors will require the continued assistance currently provided by the Policy Bureau – ie: bringing policy issues and concerns to the attention of the Board of Directors; thoroughly researching the alternatives and options; seeking and incorporating the views of the major stakeholders; and presenting fully-developed options to the Board of Directors for its consideration.

Representatives for employers have proposed that the Policy Bureau, as presently constituted, should be disbanded, and that each of the WCB Divisions should be responsible for the development and maintenance of policy matters within their own sphere of operations. I do not agree. In my opinion, having policy development generated from within each of the WCB's Divisions will result in the Board of Directors being provided options and alternatives with an "area" focus – and not necessarily with the wider "system" perspective for which the Board of Directors are ultimately responsible. The Policy Bureau currently elicits input from the particular Division when developing its information for the Panel of Administrators, but the Policy Bureau's focus must remain wider than that of any of the individual Divisions.

The Royal Commission also rejected this proposal in its *Final Report* (in Volume 1, Chapter 3, entitled "Governance and Accountability in the Workers' Compensation System", at page 54):

> It has been suggested to the commission that the bureau's current reporting responsibility should be a temporary arrangement and that eventually it should report through the president and CEO (the current president and CEO is the former interim director general of the policy bureau). The commission feels strongly that this would be an inappropriate reorganization; the bureau should be permanently assigned to act as a secretariat to the governors, under the direction of the governors' priority committee.

I agree that the Policy Bureau should permanently fall within the responsibility of the governing structure – ie: the proposed Board of Directors. I accordingly recommend that the legislation specifically acknowledge the responsibility of the Board of Directors for overseeing the operation of the Policy Bureau. (As noted in the quote set out above, the Royal Commission recommended that the Policy Bureau fall under the direction of the Governors' priority committee. In my opinion, the actual reporting relationship between the Policy Bureau and the Board of Directors should be left to the discretion of the Board of Directors to determine.)

F. The Role of the Appeal Tribunal

1. Lawful Published Policy

Decision No. 75 of the Governors (1994), 10 WCR 753 describes the authority of the Appeal Division, vis-à-vis the published policy of the WCB, at page 756:

> The Appeal Division shall apply and interpret the Act, Regulations and existing Board published policy. The Appeal Division does not have the authority to create new policy.

I fully agree with the above concepts in regard to the role the new external Appeal Tribunal should have with respect to the published policy of the Board of Directors – ie: the Appeal Tribunal's authority will be to apply and interpret the published policy of the

WCB, not to create new policy. However, as noted by the Royal Commission, "there is arguably a fine line between interpreting policy and creating it".

Given the existence of a substantial number of published policies of the WCB, the Appeal Tribunal will often consider cases where there are inconsistent published policies which may be applicable, multiple interpretations which may be given to the applicable published policy, or gaps in the published policies insofar as the particular case is concerned. In order to render its decision in the matter before it, the Appeal Tribunal Panel must have the authority to rationalize the inconsistent policies, determine the appropriate interpretation to be given to the applicable policy, or fill the gap in the policy (as the case may be).

In any of the above situations, an argument may arise that the Appeal Tribunal has gone beyond its authority to interpret and apply the published policies of the WCB. In order to respond to this concern, the *Act* should require the Chair of the Appeal Tribunal to provide written notice to the WCB Board of Directors referring the policy issue to the Directors for their consideration. The written notice should summarize the concern the Appeal Tribunal Panel has identified with respect to the applicable published policies, as well as the manner in which the Panel addressed that concern in its decision. A copy of the Appeal Tribunal Panel's decision should also be provided with the written notice.

The Royal Commission reached a similar conclusion in its Recommendation #106 (set out in Volume 1, Chapter 9 of its *Final Report*, entitled "Compensation and Assessment Appeals", on page 97):

> The Workers Compensation Act be amended to clearly state that where the Appeal Tribunal is of the view that, in relation to a case before it, no rule or guideline exists in respect of the matter, or where a rule or guideline exists but is vague or ambiguous, the tribunal shall:
>
> (a) decide the appeal; and
>
> (b) refer the issue to the board of governors of the Workers' Compensation Board for their consideration.

In reaching this recommendation, the Royal Commission raised the following comments:

(i) The Appeal Tribunal would not be required to refer the policy in question to the Governors for their determination prior to deciding the appeal. Rather, the Appeal Tribunal Panel would decide the particular case by applying the policy as the Panel believes it should be stated, and then the matter would be referred to the Governors for their consideration. The rationale for the Royal Commission's view is stated on page 97:

This is because the tribunal is not making a policy decision of general application that is binding on the rest of the board. Instead, it is filling a gap or resolving an inconsistency in the legislation, rule or guideline in the manner of any board adjudicator.

(ii) There is a need for some mechanism to ensure that the Governors deal with these referrals from the Appeal Tribunal just as seriously as referrals of potentially unlawful policies. However, there would be no need for the Governors to issue their decision arising from the referral within a prescribed timeframe.

(iii) Pending any decision by the Governors, the existing policies in question would continue to be applied by the adjudicators within the workers' compensation system, notwithstanding that such cases, if subsequently appealed to the Appeal Tribunal, could well result in a similar referral of the same policy concern to the Governors.

(iv) There would be no option for the Governors to refer policy gaps, inconsistencies or multiple interpretations to the BC Court of Appeal, as would be the case in regard to published policies which the Appeal Tribunal has determined to be unlawful.

I agree with all the concepts raised by the Royal Commission on this issue, and therefore make the following recommendations:

(i) With respect to a particular appeal before it, where a Panel of the Appeal Tribunal identifies that

   (a) there are inconsistent published policies which may be applicable,

   (b) there are multiple interpretations which may reasonably be given to the applicable published policies, or

   (c) there is a gap in the published policies insofar as the particular appeal is concerned,

   the Panel shall decide the case before it on the basis of what the Panel determines the applicable published policies should state.

(ii) The Chair of the Appeal Tribunal must provide written notice to the Chair of the WCB Board of Directors referring the policy issue, which was identified by the Appeal Tribunal Panel in its decision referred to in paragraph (i) above, to the Directors for their consideration.

(iii) Pending any decision by the Board of Directors in response to the above referral from the Chair of the Appeal Tribunal, the existing published policies in question will continue to be applied by all of the decision-makers within the workers' compensation system.

As noted previously, the Board of Directors would not be required to respond to the referral from the Chair of the Appeal Tribunal within any prescribed time frame. However, I strongly believe that parties with similar cases are entitled to be given consideration based upon similar principles, and to receive like treatment by decision-makers within the workers' compensation system. Consistency and predictability in decision-making promote credibility and fairness. In my opinion, these are values which must be encouraged by, and adopted within, the workers' compensation system.

Where the published policies of the WCB are identified to

(i) be inconsistent with other published policies,

(ii) have multiple interpretations which may be reasonably attributed to them, or

(iii) contain a gap insofar as the particular case to be determined is concerned,

it is my belief that the objectives of consistency, predictability, credibility and fairness are being fundamentally impaired. In order to rectify this concern, timely action on the part of the Directors to resolve the identified difficulties will be required.

2. Unlawful Published Policy

Section #2.1 of Decision No. 86 of the Governors (1994), 10 WCR 781 provides:

> In the event of a conflict between the *Act* or Regulations and the published policies of the governors, the *Act* and Regulations are paramount.

A decision of the Appeal Tribunal that a published policy of the Board of Directors is in conflict with the *Act* or Regulations (and is therefore an unlawful policy) should be "binding" on all decision-makers within the workers' compensation system, subject to the application of the process which I will outline below. My reasoning on this point is quite straight-forward. Since the Appeal Tribunal will be the final level of adjudication within the workers' compensation system, its pronouncements on the lawfulness of the published policies of the WCB cannot simply be disregarded by other decision-makers within the system. To do otherwise would, in my opinion, result in an injustice by having published policy, which has been identified by the Appeal Tribunal as being unlawful, applied to determine the rights and obligations of persons covered by the *Act*.

Nevertheless, before the Appeal Tribunal's decision becomes "binding" on other decision-makers within the system, the WCB Board of Directors, who hold the paramount authority over the creation and approval of published policies, must have a reasonable opportunity to consider and respond to the decision. Accordingly, I propose that the following process be followed whenever an issue is raised before the Appeal Tribunal concerning the lawfulness of a published policy of the WCB.

When an issue concerning the lawfulness of a published policy of the WCB is initially identified with respect to an appeal before the Appeal Tribunal, the matter must be referred to the Chair of the Appeal Tribunal to decide how the "lawfulness" issue is to be determined. For example, if the issue is first identified through the submissions presented at an oral hearing held by the Panel appointed to consider the appeal, the Panel would be required to refer the "lawfulness" issue to the Chair of the Appeal Tribunal, who would determine whether the issue should be considered by the existing Panel or by a different Panel constituted by the Chair. As part of the Chair's leadership role with respect to the adjudication of issues of significance to the workers' compensation system, I perceive that the Chair would, as a general principle, preside over the Panel established to adjudicate the issue concerning the lawfulness of the applicable published policy of the WCB.

In the event the Panel constituted by the Chair determines that a published policy of the WCB is unlawful, then the Chair of the Appeal Tribunal must provide written notice to the Chair of the WCB Board of Directors of the Appeal Tribunal's decision. The written notice should clearly identify that aspect of the published policy which has been determined to be unlawful, and a copy of the Appeal Tribunal Panel's decision should also be provided.

Within 60 days of receiving the written notice from the Chair of the Appeal Tribunal, the Board of Directors would be required to take one of the following steps:

(i) Confirm the Appeal Tribunal's decision that the applicable published policy is in conflict with the legislation, and therefore unlawful; or

(ii) Refer the matter to the British Columbia Court of Appeal to determine the issue of the lawfulness of the applicable published policy.

Pending the decision by the Board of Directors with respect to which of the above steps it will take, any matter within the workers' compensation system whose determination requires the application of the impugned published policy, including the particular case before the Appeal Tribunal which was the subject matter of the referral to the Board of Directors, would be held in abeyance. I will now elaborate upon each of the two proposed steps specified above:

(i) If the Board of Directors confirms the decision of the Appeal Tribunal, then the impugned policy would no longer be applied by any decision-maker within the workers' compensation system. The failure by the Board of Directors to take any of the specified steps within the 60 day time period would be deemed to constitute confirmation of the decision of the Appeal Tribunal It would be for the Directors to decide whether or not to replace the impugned policy with new published policy approved by the Board of Directors.

(ii) If the matter is referred by the Board of Directors to the Court of Appeal, all decision-makers within the workers' compensation system, including the Appeal Tribunal, would be required to continue to apply the impugned published policy from the date of the referral. The decision of the Court of Appeal would be final and conclusive with respect to both the WCB and the Appeal Tribunal.

The Royal Commission addressed the issue of the "binding" impact of a decision of the Appeal Tribunal (with respect to the lawfulness of a published policy of the WCB) on pages 93 to 97 in Volume 1, Chapter 9 of its *Final Report*. It was the Royal Commission's view that the Appeal Tribunal's declaration of unlawfulness should not be binding on other decision-makers within the WCB. Instead, the Appeal Tribunal's decision would be referred to the Board of Governors, who would be required to take one of several specified actions within a prescribed time frame.

One of these specified actions would provide the Board of Governors with the authority to determine that the published policy in question was not unlawful, notwithstanding the decision of the Appeal Tribunal. In such circumstances, it was the Royal Commission's view that the Governor's declaration (that the published policy was lawful) would be binding on the Appeal Tribunal. I am not in agreement with this aspect of the Royal Commission's recommendation.

In my opinion, the Board of Directors will be in no better position than the Appeal Tribunal to determine the lawfulness of a published policy. In fact, I believe that the Appeal Tribunal, being the senior adjudicative body within the workers' compensation system, is the more appropriate of the two organizations to reach determinations on the question of lawfulness.

Nevertheless, the process I have proposed does not leave the final decision on lawfulness to either organization if a disagreement exists between them. Instead, that final authority will ultimately rest with the BC Court of Appeal should the Directors decide to refer the matter to the Court. Pending the Court of Appeal's decision, the impugned published policy will continue to be applied within the workers' compensation system (ie: the view of the Board of Directors will prevail pending the Court's decision).

3. Whether Published Policy is Unlawful – Standard of Review

The Appeal Division has, on several occasions, been required to address the question concerning the proper standard of review to be applied when a published policy of the WCB is alleged to be in conflict with the provisions in the Workers Compensation Act. Unfortunately, several standards have been identified as being appropriate, including:

(i) The "correctness" standard – Under this approach, the applicable policy must be based on the correct interpretation of the Act. The question to be determined is whether the policy gave "optimal effect" to the legislative intent.

(ii) The "patently unreasonable" standard – The focus under this approach is whether the applicable policy involves an interpretation of the *Act* which could not be rationally supported. This standard would tolerate a possible interpretation of the *Act*, no matter how strained that interpretation might be, if otherwise lawful under the *Act*.

(iii) The "substantial reasons" standard – This standard represents an intermediary approach between the above two standards of review. Under this approach, the Appeal Tribunal would be required to provide substantial reasons in the event it decided to defer to a published policy which was a strained interpretation of the *Act*. Similarly, it would need to provide substantial reasons in the event it decided that the published policy was inconsistent with the provisions of the *Act*, and therefore unlawful.

In my opinion, the "patently unreasonable" standard is the appropriate approach for the Appeal Tribunal to take when considering whether a particular published policy of the WCB is unlawful pursuant to the provisions of the Workers Compensation Act. My opinion is based on several reasons (which have been articulated in several Appeal Division decisions on this point, with particular reference to the comments of the Panel minority in the unpublished Decision No. 99-0734):

(i) The power to create and approve published policies will, under the *Act*, expressly reside with the Board of Directors – not the Appeal Tribunal. The patently unreasonable standard recognizes the precedence to be given to this responsibility of the Board of Directors.

(ii) Many provisions in the *Act* confer a broad measure of discretion, leaving room for a broad range of options for consideration by the Board of Directors in adopting policy. It is not appropriate for the Appeal Tribunal to call a published policy unlawful on the basis that some other option (than that accepted by the Board of Directors) might better fulfill the objectives of the *Act*.

(iii) Policy-making generally involves a consideration of a broad range of factors, such as the legal interpretation given to the applicable provisions of the *Act*; an evaluation of the impact which various permissible options may have on the workers' compensation system; the application of values on the part of the policy-makers in selecting the preferred policy; the consideration of the views of the interested stakeholders; and a balancing of the benefits and costs of the various options. The Board of Directors' balancing of these often competing interests should not be second-guessed by the Appeal Tribunal.

This issue of the standard of review of the lawfulness of published policy was recently considered yet again in Appeal Division Decision No. 2001-2111 (chaired by the current Chief Appeal Commissioner). I agree with the following comments raised by the Panel (on pages 29 and 31) in adopting the patently unreasonable standard:

> The development of policy options currently rests with a separate agency within the workers' compensation system, currently the Policy Bureau. This agency has established expertise and credibility in the area of policy development. Further, the development of policy is more than the adjudication of legal rights in individual cases such as is the case before the appeal division. Always bearing in mind that policy has to be consistent with the *Act* (and other legislation such as the *Canadian Charter of Rights and Freedoms*) the development of policy often involves consultation with the employer and worker communities. This consultation can involve controversy between employer and worker interests and the resolution of that controversy can sometimes require unpopular decisions. By the time policy issues come before the governing body of the board, such as the Panel of Administrators, they have often been widely discussed and judgments have been made about how to make policy consistent with the legislation and to accommodate the interests of workers and employers. The

> final decision of the Panel of Administrators on a policy issue frequently involves a choice between various options that arise out of a complex policy development process.
>
> . . .
>
> In summary, we conclude that a standard of patent unreasonableness is an appropriate standard for the appeal division to apply to its review of policy decisions of the governing body of the board. A policy provision will be patently unreasonable if it is not viable in light of the relevant legislation (constitutional legislation may pose different considerations). If it requires some significant searching or testing to find the defect then it may be merely unreasonable and valid. But if the defect is apparent on the face of the policy then it is patently unreasonable and invalid.

Accordingly, it is my recommendation that the "patently unreasonable" standard be used by the Appeal Tribunal when considering whether a particular published policy of the WCB Board of Directors is unlawful pursuant to the provisions of the Workers Compensation Act. Due to the variety of opinions that have been previously expressed by Appeal Division Panels on this issue, it is my recommendation that this "patently unreasonable" standard be expressly stated in the *Act*.

4. Section 99 of the *Act*

I previously commented upon Section 99 when I addressed the topic as to whether the published policies of the Board of Directors should be "binding" on the decision-makers within the workers' compensation system. As will be recalled, Section 99 provides that the WCB is not bound to follow legal precedent, and its decision must be given according to the merits and justice of the case.

The following two recommendations, which I have raised in this part of my Report, appear to be in conflict with the existing wording in Section 99:

(i) Certain decisions of the Appeal Tribunal, with respect to the issue as to whether a particular published policy of the Board of Directors is unlawful under the *Act*, may be "binding" on other decision-makers within the workers' compensation system; and

(ii) The decision of the BC Court of Appeal, with respect to the issue as to whether a particular published policy of the Board of Directors of the WCB is lawful under the *Act*, will be binding on both the WCB and the Appeal Tribunal.

Accordingly, I recommend that Section 99 of the *Act* be revised so as to be consistent with the above recommendations.

G. Implementation of Changes to Published Policy

Decision No. 36 of the Governors (1993), 9 WCR 147 (entitled "Retroactivity of Policy Changes") sets out the published policy of the WCB with respect to the effective date when a change is made to a published policy. The following two guidelines are set out on pages 148:

1. There is a presumption in cases where a policy change occurs as a result of a reconsideration and rethinking of existing lawful policy that the change will not apply retroactively before the date on which the new policy was approved.
2. There is a presumption that the retroactivity of a policy change resulting from a changed view as to the proper interpretation of the law will normally be limited.

In my opinion, a presumption against, or limiting, retroactivity in the above two circumstances is not sufficient. Simply stated, I see no justification for any retroactive application of a change to an otherwise lawful published policy, regardless of the impetus for the change. Accordingly, I recommend the *Act* clearly specify that any new published policy approved by the Board of Directors of the WCB, or any change made by the Board of Directors to its existing lawful published policies, cannot be made effective to a date prior to the date on which the new or revised published policy was approved.

Decision No. 36 also addresses the issue of the effective date of a policy change which was necessitated by a finding that the existing published policy was unlawful. In such circumstances, the WCB is required to have regard to "the needs of good public administration" in determining the effective date. Guidelines #4, 5 and 6 elaborate upon the application of the concept of "good public administration".

4. Good public administration involves a balance between fairness and the practicality of undoing prior transactions.
5. Good public administration will normally require that the new policy apply to any specific case which led to the decision to make the change, as well as to all other cases currently under adjudication or appeal. Otherwise, decision makers might be faced with having to make decisions on the basis of policy which is known to be unlawful.
6. Good public administration may also require that the governors set a prior date for the general commencement of the changed policy. Retroactivity will then apply to cases not currently under adjudication where the issue in question arose after that date.

Guidelines #7 through 10 then identify several factors which must be considered in determining whether a change in policy, as a result of a finding of unlawfulness, should be applied retroactively. In my opinion, the existing published policy of the WCB concerning the effective date of a change in policy necessitated as a result of a finding of unlawfulness, as set out in Decision No. 36, is appropriate, and should be retained as the published policy of the new Board of Directors.

A. Overview

I was asked to address the following questions in my Terms of Reference:

> Should there be time limits on the ability to obtain reconsideration of past decisions with respect to compensation, occupational health and safety, employer assessment or classification matters? If so, what should these limitations be?

The existing legislation provides the WCB with very broad powers to reconsider previous decisions rendered by it. Section 96(2) of the *Act* reads:

> Notwithstanding subsection (1), the board may at any time in its discretion reopen, rehear and redetermine any matter, except a decision of the appeal division, which has been dealt with by it or by an officer of the board.

Similar wording is found in Section 113(2), which gives the WCB the authority to reconsider any decision made under Part 3 of the *Act* (dealing with Occupational Health and Safety):

> Despite subsection (1), the board has full discretionary power at any time to reopen, rehear and redetermine any matter, except a decision of the appeal tribunal, that is within the jurisdiction of the board under this Part.

Chapter 14 of the WCB's Claims Manual is entitled "Reopenings and Reconsiderations". These two concepts are described in Section #106.20 of the Claims Manual (on pages 14-1 and 14-2):

> An application for reopening is one that does not question the validity of any previous decision and does not request that a change be made in that decision but requests that further compensation be paid on the basis that the claimant's circumstances have changed since the decision was made.
>
> . . .
>
> An application for reconsideration is one that questions the validity of a previous decision on a claim and requests that a change by made in that decision.

Section #108.10 states that an application for reconsideration will not be considered unless grounds for reconsideration are specified. Sections #108.11 and #108.12 then identify the following grounds for reconsideration:

> (i) Significant new evidence indicates that a decision should be reached different from that which had been reached before;

(ii) Certain critical evidence had been obviously overlooked (as contrasted with being considered and rejected);

(iii) Facts were mistakenly taken as established which were not supported by evidence, or by any reasonable inference from the evidence;

(iv) Rumour had inadvertently been treated as evidence; and

(v) There had been some clear error of law.

In my opinion, the broad statutory discretion provided to the WCB to reconsider any decision precludes any finality to a matter which had been previously dealt with by the WCB. I believe that a much greater degree of finality must be achieved once a matter has been addressed by the workers' compensation system (which includes the timely exercising of any appeal rights that may have been available to the parties of interest).

B. Reconsideration

The focus of an application for reconsideration is on the validity of a previous decision rendered by the WCB. The application is premised on the assertion that the previous decision was wrongly decided, and should therefore be revised. If the application is successful, any changes would be applied retroactively to the date of the previous decision.

Based on the WCB's broad authority to reconsider its previous decisions, most matters can never be considered to be "final". As a result, there is always the potential of significant unknown financial liabilities being placed on the present (and the future) workers' compensation system based on the reconsideration of matters that were adjudicated some time (which may be quite lengthy) in the past.

An example of such retroactive reconsideration can be found in Appeal Division Decision #94-0194 (1994), 10 WCR 313. In that case, the worker, who had worked as a miner for 10 years, applied for compensation benefits in February 1957 as a result of respiratory problems he was experiencing. The WCB determined that the worker's condition did not arise out of or in the course of his work, and therefore denied the worker's claim in May 1957.

The worker retired from his employment in 1985 at the age of 60. In July 1989, the WCB was requested to investigate the worker's case based on new medical evidence which related the worker's respiratory problems to his work. The WCB Claims Adjudicator assigned the worker a new claim number based on this July 1989 request. In November 1989, the Claims Adjudicator denied the worker's claim.

The worker brought an appeal to the Review Board. In its findings rendered in May 1993, the Review Board accepted the worker's claim. In doing so, it characterized the WCB's 1989 investigation of the claim as a reconsideration based on significant new medical and other evidence. The Review Board determined that the worker's respiratory problems likely resulted from his employment as a miner, and that he was entitled to compensation from at least 1957.

The employer brought a further appeal from the Review Board's Findings to the Appeal Division. The employer did not challenge the determination that the worker's respiratory problems likely resulted from his employment as a miner, but did challenge, amongst other things, the Review Board's decision that the worker was entitled to compensation benefits retroactively to 1957.

The Appeal Division Panel (the former Chief Appeal Commissioner) agreed that the subsequent investigation by the WCB was properly characterized as a reconsideration. As noted by the Chief Appeal Commissioner (on page 317):

> In 1989 the worker was simply pursuing the claim initiated in 1956 with respect to his lung problems.

The Chief Appeal Commissioner also raised the following comment on page 319:

> There is no question that the post-1956/'57 medical materials showed different medical findings and opinions from those in 1956/'57.

Based upon her agreement that the 1989 investigation by the Claims Adjudicator was properly characterized as a reconsideration, the Chief Appeal Commissioner concluded that the worker was entitled to receive compensation benefits for his respiratory problems retroactive to 1957.

I find it very difficult to accept the premise that a 1957 decision of the WCB, which was based upon the medical evidence available at that time, can be characterized as "wrong" due to the production of new medical opinions more than 30 years later. Medical technology and knowledge have advanced (and presumably will continue to advance) at a rapid pace. For example, scientific understanding of causal associations for many diseases is far more advanced today than it was 10 or 20 years ago. However, decisions which were based on the available medical knowledge in earlier times should not, in my opinion, be subject to a retroactive challenge as such knowledge advances.

As previously noted, an application for reconsideration is premised on the assertion that the previous decision was wrongly decided. However, it is my opinion that the appeal structure is the appropriate process to be used to challenge an allegedly wrong decision. The purpose of the appellate system is to provide a reasonable opportunity for wrong decisions to be identified and corrected. I have recommended two appellate steps in my recommendations to meet this purpose – the internal review by the WCB and the external appeal to the Appeal Tribunal. Once these appellate steps have been completed (or, in the case where no appeal is brought, once the applicable time limits for the appeal have elapsed), the last determination made by the workers' compensation system should be final and conclusive with respect to the issue in question, and should be protected from a court challenge by a privative clause (similar to what is currently provided in Section 96(1) of the *Act*).

Nevertheless, I also believe that the workers' compensation system in BC must be flexible enough to allow a prior decision to be revisited when new evidence is presented to the WCB which has a substantial and material impact on the decision which had been previously rendered. I will elaborate upon this concept of a "reinquiry" into a previous decision in the next part of this section of my Report.

Accordingly, it is my recommendation that, subject to the one exception referred to below, the WCB's existing power of reconsideration found in Sections 96(2) and 113(2) should be deleted from the *Act*. In addition, the *Act* should expressly provide that any decision of the WCB (including a decision rendered through the internal review process) is considered final and conclusive, subject to any specified avenue of appeal which may exist in the legislation.

As noted above, I do believe there should be one exception wherein the WCB should be provided the discretion to exercise the power to reconsider an initial decision. In particular, I have been advised of situations where a party of interest questioned the validity of an initial decision with a WCB Manager within the same Operating Division from which the decision was rendered. In some circumstances, the Manager had agreed to revise the decision in dispute, thereby removing the necessity of the aggrieved party having to proceed through the appeal system.

In my opinion, it is advantageous for a party of interest to have the opportunity to address his/her concerns with the WCB in an informal and timely manner should he/she choose to do so. An acceptable resolution through such an informal process would be beneficial to the aggrieved party, since he/she would presumably be satisfied with the outcome, and to the WCB, which would have avoided the matter being formally appealed.

However, any opportunity for an aggrieved party of interest to seek such an informal reconsideration must be limited in time in order to avoid any delay in the utilization, and finalization, of the appellate process should the matter not be informally resolved.

Accordingly, it is my recommendation that a party aggrieved by a decision rendered by an initial decision-maker should have the opportunity to request the WCB to reconsider the matter. Whether or not the WCB agrees to conduct such a reconsideration should be left within the discretion of the WCB. However, the WCB's authority to reconsider the decision of the initial decision-maker would cease upon the earlier of:

(i) the expiry of 75 days from the date that the decision by the initial decision-maker was communicated, in writing, to the affected parties, or

(ii) the date that the aggrieved party of interest applies for an internal review of the disputed decision.

For the sake of clarity, I want to explain how the WCB's opportunity to conduct this limited reconsideration of an initial decision would interface with the 90 day time period for an affected party to apply for internal review. In the circumstances where the WCB either

(i) refuses to conduct a reconsideration of the initial decision, or

(ii) fails to render its reconsideration decision within 75 days of the date the disputed decision was communicated, in writing, by the initial decision-maker to the affected parties, or

(iii) renders its reconsideration decision confirming the initial decision,

the aggrieved party's application for internal review must be commenced within the 90 day period from the day that the disputed decision of the initial decision-maker was communicated to him/her. In other words, the original 90 day period to commence the application for internal review would not have been delayed or suspended by the aggrieved party's request for reconsideration.

However, if upon reconsideration the WCB makes any revision to the disputed decision, then the 90 day time frame to apply for an internal review would commence from the date that the WCB's reconsideration decision letter was communicated, in writing, to the affected parties.

C. Reinquiry

I have no doubt that advances in medical technology and knowledge will raise questions concerning the merits of claims which had been previously decided by the WCB. However, the mechanism needed to address these situations does not, in my opinion, lie in retroactive adjudication. A balance must be achieved between finality of previous decisions rendered by the WCB/appellate system and the ability of the worker's compensation system to respond to new circumstances.

As I indicated previously, I believe that the workers' compensation system in BC must be flexible enough to allow the WCB to conduct a "reinquiry" into a prior decision when new evidence is presented which has a substantial and material impact on the previous decision. I will now set out the general principles with respect to how this "reinquiry" process would work.

(i) An application for a reinquiry could only be made by a party with respect to a "final" decision rendered by the WCB/appellate system (ie: after all the available appellate steps have been completed or, in the case where an available level of appeal was not utilized, after the applicable time limit for commencing the appeal has elapsed).

(ii) A prerequisite for having the WCB conduct a reinquiry of a previous "final" decision would be the presentation by the applying party of new evidence which has a substantial and material impact on the previous decision. For instance, this could include significant new evidence arising from medical advances which have occurred since the previous decision was rendered.

(iii) The application for reinquiry would be made to the initial decision-making level of the applicable Division of the WCB.

(iv) The initial decision-maker would have to determine the following two issues with respect to an application for reinquiry:

(a) Has new evidence been presented which has a substantial and material impact on the previous decision?

(b) If the above question is answered in the affirmative, then the initial decision-maker would have to consider the merits of the application for reinquiry - should the result of the previous decision be revisited based upon the new evidence which has been presented?

(v) The initial decision-maker's determination, with respect to the above two issues, would be subject to an appeal by an affected party to the internal review process, and subsequently to the external Appeal Tribunal.

(vi) If the previous "final" decision is revisited and ultimately changed as a result of an application for reinquiry, the change would be effective only from the date the party's application for reinquiry was submitted to the WCB (ie: there would be no retroactive application of the change made to the previous decision).

(vii) As recommended previously, the WCB would no longer have the authority to "reconsider" (ie: to retroactively change) any prior decision rendered by it, whether the decision was rendered before or after the anticipated changes to the *Act*. Accordingly, a party would be entitled to apply for a reinquiry, pursuant to the above principles, with respect to any previous decision rendered within the workers' compensation system (ie: the application for reinquiry would not be limited to only decisions rendered after the effective date of the anticipated new legislation).

There is one final comment I want to raise with respect to a party's right to apply for a reinquiry into a prior decision. I anticipate that there will be some parties who will simply not accept a negative decision from the WCB, and will continually submit new information seeking to achieve a different result. Such repetitive requests for a reinquiry will eventually constitute an abuse of the WCB's adjudicative processes.

In order to address this concern, I believe the WCB must have the authority to ultimately determine that it will not entertain any further applications for reinquiry from a specified party with respect to a prior decision. I make the following recommendations with respect to such a determination:

(i) The determination that the WCB will not accept any further applications for reinquiry from a specified party must be made by the President of the WCB (or, in the President's absence, his/her delegate).

(ii) The President shall determine whether the refusal to consider further applications for reinquiry will last for a specified or indefinite period of time.

(iii) The President's determinations under paragraphs (i) and (ii) above are final and conclusive, and therefore are not subject to any review or appeal within the workers' compensation system.

D. Reopening

As noted at the outset of this section, an application for reopening does not question the validity of any previous decision made by the WCB. Instead, the application is based upon a request for additional compensation benefits due to a change in the worker's circumstances since the time of the previous decision, such as medical deterioration of the worker's compensable condition. The WCB treats an application for reopening as a new matter for adjudication.

An application for reopening can be brought many years after the occurrence of the original compensable injury. Where the application to reopen the worker's claim is brought three years or more after the original injury, Section 32 of the *Act* gives the WCB a discretion to calculate the worker's entitlement to further compensation benefits by reference to his/her current earnings at the time of the recurrence.

The *Act* must continue to allow an accepted claim to be reopened when there has been a significant change in the worker's compensable condition since the time of the original injury. In my opinion, it would be arbitrary, and contrary to medical science, to fix compensation entitlement as of one specified date, and not to recognize changes that may occur in the worker's medical condition or disability. Since the original injury was previously determined to have been work-related, the worker should be entitled to receive consideration for further compensation benefits in the event that his/her compensable condition has deteriorated. I am also in agreement with the WCB's existing policy to treat an application for reopening as a new matter for adjudication under the *Act*.

A. Overview

I was asked to address the following question in my Terms of Reference:

> Should the *Act* continue to provide "universal coverage" or should the scope of the coverage revert to the "exclusionary coverage" provided prior to the enactment of Bill 63 in 1994, or some other variation?

B. Universal Coverage

Prior to January 1, 1994, workers' compensation coverage in BC was "exclusionary", in that workers and employers were not covered under the *Act* unless they fell within specifically designated industries, or the WCB extended coverage to the industry on application. Effective January 1, 1994, the *Act* was amended to provide for "inclusionary" coverage, in that all workers and employers were covered by the *Act* unless specifically excluded by order of the WCB. This "inclusionary" coverage is currently reflected in Section 2(1) of the *Act*:

> This Part applies to all employers, as employers, and all workers in British Columbia except employers or workers exempted by order of the board.

The 1994 amendments to the *Act* were introduced in Bill 63 – 1993 (Workers Compensation Amendment Act, 1993). In a Discussion Paper dated September 25, 2001, entitled "Coverage of the Workers Compensation Act", the WCB described the impact of the Bill 63 amendments (on page 1):

> The 1994 amendments (referred to as Bill 63) brought approximately 24,000 employers within the compulsory scope of the Act. The larger industries brought in were financial institutions (including banks), consultants, professional offices (accountants, doctors, dentists, lawyers), insurance carriers and agencies, real estate agencies, and social service agencies. Several of those industries objected, and continue to object, to being within the compulsory scope of the Act.

As noted in the above excerpt, several of the industries that were brought within the ambit of the *Act* pursuant to Bill 63 continue to object to their mandatory coverage. It is my understanding that this objection is based primarily on the following two factors:

(i) There is a very low risk of work-related injury or illness in most of the industries which were mandatorily included within the *Act* pursuant to Bill 63.

(ii) The employers in the industries covered by Bill 63 had generally provided at least equivalent, if not better, benefit coverage to its workers who suffered a work-related injury or illness.

In my opinion, the concept of inclusionary (or universal) workers' compensation coverage should be maintained in BC. I base my opinion on the following rationale:

(i) From the perspective of equity, I have difficulty accepting the premise that a worker in a bank or a law office, who develops carpal tunnel syndrome as a result of his/her work, or who is inadvertently exposed to asbestos at the work place and develops mesothelioma, should be treated any differently from a worker who works at the head office of a large forestry company and who develops the same work-related illness or injury.

(ii) I have three comments in response to the argument that the employers in the industries covered by Bill 63 had generally provided at least equivalent, if not better, benefit coverage to workers who suffered a work-related injury or illness. **First**, I find it impossible to accept that all employers covered by Bill 63 had provided equivalent or better benefit coverage than the compensation standards set out in the *Act* (even if no consideration is given to the health care, vocational rehabilitation and survivor benefits provided for under the *Act*).

Second, if the *Act* permitted certain industries (or employers) to opt out of the workers' compensation system on the basis that, at a minimum, equivalent compensation benefits would be provided to their workers who suffered a work-related illness or injury, someone would need to monitor and enforce the maintenance of such minimum standards. In my view, this administrative monitoring/enforcing function would be quite onerous to maintain.

Third, if an option to opt out of the workers' compensation system (in favour of private coverage) was permitted, I do not see why such an option would be restricted to a limited number of industries or employers. However, the greater the number of employers who are allowed to opt out of the system, and who actually do so, the greater the risk that the workers' compensation system will be unable to maintain its financial viability based on the principle of modified collective liability.

(iii) With respect to the assertion that there is a very low risk of work-related injury or illness in most of the industries covered by Bill 63, I wish to raise two responses. **First**, the fact that most of these industries involve a low risk of work-related injury or illness is clearly reflected in the base assessment rate which the WCB levies on the assessable payroll of the employers in these industries. For example, the 2001 base assessment rates (per $100 of assessable payroll), for the following industries which were covered by Bill 63, are:

Accounting Offices:	$0.08
Insurance Services:	$0.13
Financial Institutions:	$0.14
Law Offices:	$0.15
Real Estate Agencies:	$0.24
Medical and Dental Offices:	$0.30

In comparison, the average base assessment rate in 2001 for all employers covered under the *Act* was $2.01.

Second, an equity issue again arises from the perspective that if the low risk "Bill 63" industries are excluded, why should other non-Bill 63 low risk industries similarly not be excluded from the mandatory coverage under the *Act*? If all low risk industries were permitted to be excluded, what criteria would the WCB need to develop to determine when an industry qualifies as "low risk"? Would the industry have to maintain its low risk status for a specified period of time before it could be excluded? If the low risk industry was excluded, would it once again become subject to mandatory coverage if it subsequently became a higher risk industry? Finally, what would the impact be on the viability of the Accident Fund if industries were excluded (and potentially re-included) from mandatory coverage due to the nature of their risk of work-related injury or illness?

The Royal Commission considered the topic of "Universal Coverage" in Volume II, Chapter 3 of its *Final Report* (entitled "The Scope of Compensation Coverage in British Columbia: Who is Covered?"). The Royal Commission made the following recommendations:

(i) The principle of universal coverage of workers and employers should be retained, but should be more explicitly stated in the *Act*.

(ii) The exclusive authority of the Board of Governors to grant exemptions from mandatory coverage under the *Act* should be clearly stated in the legislation.

(iii) Existing exemptions from mandatory coverage should be listed in a Schedule to the *Act*.

(iv) The existing criteria for exemptions should be contained in the legislation, not in policy.

With respect to the first two recommendations set out above, I agree that the principle of universal workers' compensation coverage for workers and employers in BC should be retained. However, I believe that the existing wording in Section 2(1) of the *Act* is satisfactory to achieve that objective, and therefore does not have to be revised to be more "explicit". Notwithstanding, I do agree with the Royal Commission that Section 2(1) of the *Act* should specifically provide the governing body of the WCB with the exclusive authority to grant exemptions. This can be easily achieved by revising the closing words of Section 2(1) to read "...except employers or workers exempted by order of the Board of Directors".

Turning to the issue of listing the existing exemptions in a Schedule to the *Act*, I agree with this recommendation. There are currently five categories of exemptions granted by the governing body of the WCB. The *Act* should clearly identify those workers and employers who are not mandatorily covered, and this objective can be easily achieved by attaching a Schedule to the *Act* which can be revised by order of the Board of Directors.

Finally, I do not support the Royal Commission's recommendation that the criteria for exemption, as established through policy adopted by the governing body, should be set out in the legislation. Although I agree with the Royal Commissions' assessment that the existing criteria for exemption (as set out in Decision #60 of the Governors (1994), 10 WCR 167) are appropriate, I believe that the governing body should maintain the flexibility to revisit, revise and/or re-emphasize the criteria if and when the need arises to do so.

Chapter 7: BENEFITS

A. Overview

As identified on the first page of my Terms of Reference, this Core Services Review is to "be guided by the 'historic compromise' that underpins the establishment of the workers' compensation system". Prior to discussing any of the "benefits" issues which have been raised for my consideration, it is important to set out my understanding of what the "historic compromise" provided for workers.

Pursuant to the "historic compromise", workers gave up the right to sue their own employers (as well as other employers and workers covered by the legislation) in court, and to seek full damages for all economic and non-economic losses they had incurred as a result of a work-related injury or illness. In return, workers were provided protection against income losses arising from a work-related injury or illness, regardless of fault.

Advocates for disabled workers and for labour assert that the "historic compromise" envisioned entitlement to compensation for the full economic losses suffered by the worker as a result of a work-related injury or illness. If less than full economic protection is provided, these advocates argue that workers may well be better off in being allowed to sue their own employers (as well as other employers and workers) for the full extent of their economic and non-economic damages, rather than being covered by no-fault workers' compensation benefits.

I fully acknowledge and accept the principle that the "historic compromise", when viewed from the workers' perspective, rests on a foundation of entitlement. Where I disagree with the advocates for disabled workers and for labour is whether the "historic compromise", as adopted in BC and in other Canadian jurisdictions, ever envisioned a worker's entitlement to be compensated for his/her full economic loss arising from a work-related injury or illness. I also question whether workers, as a whole, would be better off in being allowed to sue their own employers (and others) in court rather than receiving no-fault compensation benefits on a "less than full" economic loss basis.

Starting with the first of the two issues I have raised above, the workers' compensation legislation in BC has never been predicated on full recovery of all economic losses suffered by a worker as a result of a work-related injury or illness. The first such legislation was introduced in BC in the *Workmen's Compensation Act*, S.B.C 1916, c.77. Compensation benefits provided to workers for permanent or temporary disabilities were to be "equal in amount to fifty-five per centum of his average earnings". (See Sections 17, 18, 19 and 20 of the 1916 legislation.) Furthermore, Section 22(1) of the 1916 *Act* established a maximum wage rate, for compensation purposes, at $2,000 per year.

It is therefore obvious that the initial intent of workers' compensation legislation in BC was to provide workers, who suffered a work-related injury or illness, with significantly less than full compensation for economic losses (particularly when one takes into account the fact that Canadians did not pay income tax in 1916). Although revisions were subsequently made to both the percentage of the average earnings upon which the compensation rate was based (first to 66 2/3%, and then to 75% in 1954), and the amount of the maximum wage rate for compensation purposes, the BC workers' compensation system has always been premised on the concept of providing less than full protection from economic loss suffered by a disabled worker.

Similarly, all other jurisdictions in Canada have based their workers' compensation system on the concept of providing less than full protection from economic loss suffered by a disabled worker. In particular, in every Canadian jurisdiction (with the exception of the Yukon and BC), the workers' compensation system is structured to replace a percentage of the disabled worker's net earnings. Furthermore, in each of these jurisdictions, the percentage of net earnings is set at less than 100%. (The percentages range, generally speaking, from 75% to 90% net.) Finally, all Canadian jurisdictions have established a maximum wage rate upon which compensation benefits can be paid.

With respect to the second issue, I do not accept the premise that workers, as a whole, would be better off in being allowed to sue their own employers (as well as other employers and workers covered by the *Act*) rather than receiving no-fault compensation benefits on a "less than full" economic loss basis. **First**, bringing an action in court is a precarious undertaking. I do not doubt that some workers would receive a substantially greater monetary amount by way of a damage award should the court determine that the employer was 100% at fault for the cause of the worker's illness or injury. However, I believe that such success would only arise in a small number of cases.

On the flip side, I also have no doubt that some workers would receive nothing from the courts (in those cases where the work-related accident was found to be no one's fault, or where the worker was found to be 100% at fault). Once again, I believe that this outcome would only arise in a small number of cases.

The vast majority of the cases would presumably fall somewhere between these two extremes. In other words, both the worker and the employer (or others) would be found to have contributed varying degrees of fault which resulted in the worker's disability. The worker's entitlement to recover damages would be reduced by his/her contribution to the cause of the work-related disability.

Second, bringing an action against one's employer, based on fault, is, generally speaking, an expensive proposition. There would be a significant number of disabled workers who would not have the economic ability to bring such an action. These workers would obviously be greatly disadvantaged by a system based on fault which required the court's intervention, as opposed to a no-fault workers' compensation system.

Third, bringing a court action against one's own employer, based on fault, often results in irreparable damage to the employment relationship. One of the objectives of the workers' compensation system is to rehabilitate and return an injured worker to work. A primary focus of achieving this objective is on having the injured worker return to work with his/her pre-injury employer. In my opinion, this objective is much more attainable through a no-fault compensation system than though a fault driven court action.

Finally, I endorse the following comments raised by Mr. Justice Tysoe on page 18 of his 1966 Report entitled "*Commission of Inquiry Workmen's Compensation Act*":

> I commenced my studies of the law in the days before the enactment of the first *Workmen's Compensation Act* with its present concepts, and it so happened that, as a student, I was associated with a legal firm which acted for insurers of employers and so had a large practice defending, on behalf of employers and their insurers, actions brought by workmen for damages for injuries arising in the course of their employment. I was impressed with the difficulties and obstacles which faced workmen, and I whole-heartedly endorse Chief Justice Sloan's statement that there was a "common-law recovery of damages in only 20 to 30 percent of injury cases, and only then after a protracted and anxious bout with the law." Notwithstanding any seeming defects in administration, there is no shadow of a doubt that workmen have always been immeasurably better off under the *Workmen's Compensation Act* than they were prior to its enactment. The fact is that roughly 75 percent of those who are recipients of the extensive benefits provided by the Act would have received nothing at all in earlier times, and they make no financial contribution to the cost of these benefits.
>
> It would not be right were I to omit to say that, in my opinion, employers are also better off than they would be were the Act not in force. They are relieved of the expenditure of time and money contesting workmen's claims against them in the Courts and of the ill feeling that is generated by hard-fought legal battles.
>
> It is my feeling that the Act has benefited workmen and employers in about equal proportion.

In my opinion, the focus, with respect to providing compensation benefits to a disabled worker, is on fair protection against economic loss arising from a work-related injury or illness – not on full protection. Unfortunately, what is perceived as being fair by one person will not always be similarly perceived by others. However, I have been given the responsibility to recommend what constitutes "fair" compensation within the BC system. In fulfilling this mandate, I have considered the views of the key stakeholders, the recommendations and discussion of our most recent Royal Commission, and the standards that have been adopted in other Canadian jurisdictions.

In the remainder of this section of my Report, I will be addressing the following issues:

(i) Should the compensation rate be based on a percentage of gross or net earnings? What is the appropriate percentage rate to be applied to such earnings?

(ii) Should there be a minimum and/or a maximum to the level of compensation benefits payable under the *Act*? If so, what should those levels be?

(iii) Should there be a waiting period for eligibility for workers' compensation benefits? If so, should the employer be obliged to maintain the injured worker's wages during such waiting period?

(iv) Should the way in which compensation benefits are currently indexed be changed?

(v) Should compensation benefits be integrated with, or stacked on top of, other income maintenance benefits, either public or private?

(vi) What changes, if any, should be made to he method of calculating a worker's average earnings for the purposes of Section 33 of the *Act*?

The Royal Commission dealt with the topic of "The Adequacy of Benefits" in Volume II, Chapter 1 of its *Final Report*. I will be referring to the Royal Commission's discussion throughout this section of my Report. I will also be referring to information contained in the September 24, 2001 Briefing Paper prepared by the WCB entitled "Benefits Levels".

B. Gross vs. Net Earnings

BC is only one of two jurisdictions in Canada which bases its compensation rate on the gross average earnings of the worker. (The Yukon is the other.) All of the other jurisdictions in Canada base their compensation rate on varying percentages of the net average earnings of the worker.

As noted previously, when workers' compensation legislation was introduced in BC in 1916, the rate of compensation was based on 55% of the worker's average earnings. Since there were no deductions at that time for income tax, Canada Pension Plan ("CPP"), or Employment Insurance ("EI"), the 55% compensation rate was, in effect, applied to the worker's gross earnings. Although income tax, CPP and EI deductions have since had a significant impact on the amount of wages which a worker takes home from his/her employment, the only adjustment which the workers' compensation legislation has made was to increase the percentage of the compensation rate (to 66 2/3%, and then to 75%, of the worker's gross average earnings). As noted by the Royal Commission on page 54 of its *Final Report*:

> Stated differently, the calculation of compensable earnings does not take account of three critical developments since 1916 that affect the pay packet of virtually every worker in British Columbia: income taxes, the Canada Pension Plan and Employment Insurance.

Workers' compensation benefits are provided to a disabled worker on a tax-free basis. As a result, setting the compensation rate at 75% of the worker's gross earnings (up to a maximum ceiling of earnings) has the progressive effect of having the majority of wage earners receiving less than 100% of their net take-home pay, a small group of wage earners who will actually receive 100% of their net take-home pay, and a significant minority of workers who will receive more than 100% of their net take-home pay. (I acknowledge that, due to the maximum ceiling on earnings, a point will be reached where a higher wage earner will receive less than 100% of his/her net earnings while in receipt of compensation benefits.)

This progressive impact of the "gross earnings" system is described on page 14 of the WCB's Briefing Paper. Using figures based on the tax rates in effect on January 1, 2000, the Briefing Paper noted the following:

> Under the Board's current compensation rate of 75% of gross earnings, it has been estimated that most workers with incomes under $35,000 (60% of injured workers) receive less than 100 % of their net earnings. At approximately $36,000, workers receive compensation equal to their net earnings. Those workers with incomes between $37,000 and $64,000 may receive more than 100% of net earnings. Within this range, approximately 20% of injured workers may receive between 104% and 108% of their net earnings in compensation benefits. Workers with incomes above $65,000 will receive less than 100% of net earnings in compensation.

In a footnote on page 16, the Briefing Paper acknowledged that the effect of the recent Provincial tax cuts has been to significantly reduce the number of workers receiving compensation greater than 100% of their net earnings.

As discussed at the outset of this section, I view my task as recommending a system which provides fair compensation benefits to disabled workers – not full compensation. One of the fundamental principles in which I believe, with respect to providing fair compensation benefits, is that a disabled worker should not receive more take-home pay while in receipt of workers' compensation benefits than he/she would have received while at work. Several suggestions have been raised for my consideration in regard to meeting this objective:

(i) Continue to pay 75% of the worker's gross earnings (or some higher percentage), but make the compensation benefits taxable.

(ii) Maintain the compensation rate at 75% of gross earnings, but enact a ceiling that no worker can receive more than 100% of his/her net earnings.

(iii) Adjust the existing 75% compensation rate to a lower percentage of gross earnings.

(iv) Enact a sliding scale of compensation rates based on gross earnings, whereby the lower earnings would have a higher compensation rate. For example, a worker who had gross earnings of $35,000 or less would continue to receive compensation based on the 75% rate; workers with earnings above $35,000 to $50,000 would receive compensation based on a lower rate; and those earning over $50,000 to the maximum would have their compensation based on yet a lower rate.

(v) Revise the compensation rate to be based on a percentage of the worker's net earnings rather his/her gross earnings.

In my opinion, all of the above options contain troublesome elements from the perspective of either the administration of the new system and/or the monetary impact the change would have on the existing compensation benefits paid to disabled workers. Rather than reviewing the pros and cons of each of the above options, I will only be discussing the option which I believe is best suited to meet my objective – the adoption of a compensation system where the rate is based on a percentage of the worker's net earnings.

In support of this recommendation, I raise the following two comments. **First**, the utilization of net earnings as the basis for providing compensation benefits is not a unique or new concept. As noted previously, all other jurisdictions in Canada (with the exception of the Yukon) have adopted such a system. In this regard, BC has lagged behind the consistent legislated pattern across Canada of the acceptance of what I have referred to as one of my fundamental principles – that a disabled worker should not receive more take-home pay while in receipt of workers' compensation benefits than he/she would have received while at work.

Second, the majority of the Royal Commission reached a similar conclusion, recommending that temporary and permanent disability benefits paid under the Act should be based on net, rather that gross, earnings. In reaching this determination, the majority stated the following on pages 54 and 55 of its *Final Report*:

> The commission has ascertained that of the 12 Canadian jurisdictions, only British Columbia and the Yukon compensate on the basis of gross earnings. All 10 of the remaining jurisdictions compensate on the basis of net earnings. A worker has a number of items deducted from earned income to arrive at after-tax income, the main ones being contributions to the Canada Pension Plan and the Employment Insurance Plan, and source deductions for federal and provincial income tax. To be equitable in an environment where taxes and other statutory payroll deductions are a reality faced by all British Columbians, workers' compensation benefits must be based on a reasonable approximation of the net income that workers lose as a result of work-related injury or illness, rather than by reference to an abstract gross income which may bear little relationship to actual loss.

Accordingly, I make the following recommendations:

(i) Temporary and permanent compensation benefits paid pursuant to the Act should be based on net, rather than gross, earnings.

(ii) Net earnings would be calculated by deducting the following items from the worker's gross earnings:

  (a) the worker's probable Employment Insurance contributions for those earnings;

  (b) the worker's probable Canada Pension Plan contributions for those earnings; and

  (c) the probable amount of the worker's Federal and Provincial income tax for those earnings.

The following two concerns have been raised with respect to the adoption of the "net earnings" system:

(i) The WCB will encounter difficulties in administering the "net " system. These difficulties were described on page 16 of the WCB's Briefing Paper:

> Under a "net" system, tax cuts would automatically result in a corresponding increase in benefit costs under a net system. Changes in CPP and EI premiums would also impact benefit levels and costs. As a result, there would be less ability for the workers' compensation system to control and predict its benefit levels.

(ii) There will be "equity" concerns with respect to the application of the "net" system to individual workers. This concern was discussed on page 14 of the WCB's Briefing Paper:

> However, given the variety of tax deductions that are available to individual workers, there would be equity concerns. For example, with the same disability and gross income, a worker without any dependants would receive less compensation through a net system than would a worker with dependants.

With respect to the first concern set out above, I recognize the potential administrative difficulties associated with the adoption of the "net earnings" system. In particular, there are several potential avenues for change which could impact the calculation of the worker's net earnings:

(i) changes to the Federal or Provincial tax system,

(ii) changes to the level of CPP or EI contributions required to be made by the worker, and

(iii) changes in the personal status of the worker (ie: single vs. married vs. having dependent children).

In my opinion, the net earnings system adopted in BC must be implemented in as administratively efficient a manner as possible. In order to achieve this objective, the administration of the net earnings system must be structured around the collective group of all workers in BC – and not on the individual worker's circumstances.

I have reviewed how the net system is administered in other Canadian jurisdictions, and I have come to the conclusion that the system adopted in Alberta is the most administratively efficient. With respect to changes to the income tax system or to the level of CPP or EI contributions, Alberta uses the prior year's rules to calculate the worker's net earnings, which is effective January 1st of the current year. Consequently, the Alberta WCB does not respond immediately to changes in the current year to income tax, CPP or EI changes.

With respect to changes in a worker's personal circumstances, Alberta Regulation #427/81 (made pursuant to the Alberta Workers' Compensation Act) requires a formula to be used in all cases to determine the worker's net earnings. This formula requires the Alberta WCB to determine the worker's personal tax credits based on 1.5 times the worker's basic personal exemption, regardless of the worker's marital status or number of dependants. Accordingly, this formula is not affected by any changes in the individual worker's circumstances.

I recommend that the following concepts, with respect to the WCB's administration of the net earnings system, be incorporated into a Regulation enacted pursuant to the *Workers' Compensation Act*. (I have recommended the utilization of a Regulation, as opposed to including these concepts directly within the *Act*, to permit greater ease should revisions be required in the future to the manner in which the net earnings system is administered by the BC WCB.)

(i) The amount of the CPP and EI deductions to be made, and the income tax rate to be applied, are to be determined solely by reference to the gross employment earnings of the worker, up to the maximum earnings level specified in the *Act*. No consideration would be given to the actual amount of the CPP and EI contributions paid by the worker, nor to the actual tax rate applicable to that worker. Accordingly, all workers who have the same gross earnings would have the same amount of CPP and EI deductions made, and the same tax rates applied, to their gross earnings.

(ii) The calculation of a worker's net earnings would be based on the income tax rates and the level of CPP and EI deductions that were in effect as of December 31st of the previous year. Accordingly, any changes made to the Federal or Provincial tax system, or to the level of CPP or EI contributions, during a calendar year would not be taken into account until January 1st of the following year.

(iii) In determining the probable Federal and Provincial income tax rates for the worker, the following tax credits would be attributed to each disabled worker:

    (a) tax credits based on 1.5 times the basic personal exemption as of December 31st of the previous year, and

    (b) tax credits for the CPP and EI contributions attributed to the worker pursuant to points (i) and (ii) above.

(iv) A disabled worker's net earnings would be redetermined by the WCB effective January 1st of each year, based upon the principles set out in points (i), (ii) and (iii) above.

The legislation in most Canadian jurisdictions require the WCB to establish a schedule which sets out the deductions for income tax, CPP and EI to be made from the worker's gross earnings. For example, Section 55(3) of the Ontario Workplace Safety and Insurance Act provides:

> On January 1 every year, the Board shall establish a schedule setting out a table of net average earnings determined in accordance with this section. The schedule is conclusive and final.

A similar provision should be included in the BC legislation. Accordingly, I recommend that the *Act* be amended to include the following provision:

> The WCB shall, on January 1st of each year, establish a schedule setting out a table of net earnings determined in accordance with the regulations referred to in subsection ____ above. The schedule established by the WCB shall be final and conclusive.

Turning to the second concern raised above (with respect to the "equity" of the application of the net earnings system to individual workers), I acknowledge that using a standard formula for all workers will result in some workers receiving less, and some receiving more, than the applicable percentage of their actual net earnings (as discussed in the next part of this section). For example, a worker with a spouse and two dependent children would have greater actual tax credits than will occur through the utilization of the standard formula proposed above (ie: 1.5 times the worker's basic personal exemption). As a result, the compensation benefits payable to the worker would be greater if the net earnings are based upon his/her actual tax credits.

The reverse impact occurs for a single worker whose actual basic personal exemption would be less than the 1.5 formula proposed above. The compensation benefits payable to this worker would therefore be less if the net earnings are based upon his/her actual tax credits.

There are two comments I want to raise in response to the "equity" concern noted above.

(i) The formula I have recommended for determining the worker's net earnings is equitable from the perspective that the same formula will be utilized for all workers. This is another example where the workers' compensation system in BC must be based upon the collective perspective of all workers, as opposed to the individual circumstances of each particular worker.

(ii) As will be discussed in the next part of this section, I have taken this negative impact on the level of benefit entitlement for certain workers, which arises from the need to adopt a net earnings system which is as administratively efficient as possible, into account when determining the percentage rate of net earnings to be applied for the purpose of providing compensation benefits pursuant to the *Act*.

There is one final aspect of adopting a net earnings system which I believe is worthy of comment. Changes to the Federal or Provincial income tax system, or to the level of CPP or EI contributions made by workers, will impact the level of compensation benefits payable to disabled workers under the *Act*. As a result, the amount of assessments required to be paid by employers may also fluctuate as a result of changes to the income tax system, or to CPP or EI contribution levels.

For example, the recent Provincial tax cuts will result in higher net earnings received by workers. This will result in higher compensation benefits being paid to these workers, which may necessitate increased assessments paid by employers. On the other hand, if the tax rates are increased in the future, the impact to the compensation levels paid to workers, and therefore to those assessments required to be paid by employers, would be reversed.

These fluctuations in compensation benefits payable under the *Act* would not be experienced in the gross earnings system currently utilized in BC. However, such fluctuations are an inherent aspect of the net earnings system. This does not mean that employers will pay higher assessment rates under the net earnings system than is currently the case in BC. I simply raise the point to identify an expected consequence of the net earnings system.

C. The Percentage Rate to be applied to Net Earnings

One page 17 of its Briefing Paper, the WCB identified the compensation rate in each of the Canadian jurisdictions which utilize the "net earnings" system:

Jurisdiction	Compensation Rate
Alberta	90% net
Saskatchewan	90% net
Manitoba	90% net for first 24 months, 80% net thereafter
Ontario	85% net
Quebec	90% net
Nova Scotia	75% net for first 26 weeks, 85% net thereafter
New Brunswick	85% net
Prince Edward Island	80% net for first 39 weeks, 85% net thereafter
Newfoundland	80% net
Northwest Territories/ Nunavut	90% net

Representatives for employers have submitted that I should recommend a compensation rate in BC based on 80% of the workers' net earnings. Labour and disabled worker advocates oppose the move from gross to net earnings. However, if such a move must take place, they argue that a disabled worker should receive no less than 100% of his/her net earnings.

I cannot accept either of these positions on which to base my recommendation. With respect to the employers' position, they have adopted the very low end of the range found in other jurisdictions. Clearly the majority of the jurisdictions have adopted a compensation rate based on 85 – 90% of the worker's net earnings. Similarly, no jurisdiction has accepted the position advocated on behalf of labour and disabled workers - that a disabled worker should receive 100% of his/her net earnings.

The majority of the Royal Commission recommended the adoption of a compensation rate based on 90% of the disabled worker's net average earnings. In reaching this conclusion, the majority relied on the following factors:

> Most workers' compensation systems in North America are structured to replace less than 100% of net loss earnings. It is widely acknowledged in the literature that replacing less than the full earnings loss is generally intended to encourage workers to return to work. (On page 61 of the *Final Report*)
>
> . . .
>
> The commission is of the view that adjusting the replacement rate upward from the amount recommended by employers to 90% of net average earnings is one way to take some account of long-term loss of fringe benefits. As with many other aspects of the system, this approach is aimed at promoting collective justice rather than measuring precise individual losses. Under all of the circumstances the commission considers this to be a fair and just approach to this difficult issue.
>
> The commission also considers a replacement rate of less than 100% appropriate in light of considerations relating to incentives and disincentives. (On page 62)
>
> . . .
>
> The commission recognizes that not all workers require the return-to-work incentive created by a replacement rate of less than 100% of net average earnings. At the same time, the studies noted earlier cannot be totally ignored, although they should be interpreted cautiously. In light of these factors, the commission concludes that if a replacement rate adjusted downward to reflect the need for return-to-work incentives is to be adopted, it should be a modest one. (On page 65)
>
> . . .
>
> The commission has concluded that the insurance function of the workers' compensation system is central to protecting the financial security of injured workers. The commission also recognizes that this insurance function must be balanced against the costs of the system, and ensuring that remuneration from work exceeds remuneration from benefits. (On page 65)

Consideration of the compensation rates adopted in other Canadian jurisdictions reflect an average rate of approximately 85% of the worker's net earnings. Nevertheless, I recommend that the compensation rate, for providing temporary and permanent benefits to disabled workers in BC, should be based on 90% of the worker's net earnings. The rationale for my recommendation is as follows:

(i) I find the reasoning of the majority of the Royal Commission, in recommending the adoption of a compensation rate based on 90% of the disabled worker's net earnings, to have been based upon a fair and reasonable consideration of the competing factors.

(ii) As was the case in the Royal Commission's recommendations, I have also taken into account the disabled worker's long-term loss of fringe benefits in setting the 90% net earnings rate.

(iii) As discussed in the last part of this section, I have proposed an administrative process for calculating a worker's net earnings which, in the words of the Royal Commission, "is aimed at promoting collective justice rather than measuring precise individual losses". I have sought to balance any negative impact which may occur to an individual worker, arising from this collective administrative process, by adopting the 90% net earnings rate.

(iv) The adoption of the 90% net earnings rate will in fact be beneficial to those disabled workers who have lower annual earnings from employment. For those workers who earn less than approximately $33,000 to $35,000 annual gross income, the adoption of the 90% net earnings rate will provide a higher amount of compensation benefits than would be the case under the existing 75% gross earnings rate of compensation.

D. Minimum Level of Compensation Benefits

Section 22(2) of the Act provides for a minimum monthly compensation award of $1,319.06 (as of January 1, 2002, as per the adjustment required under Section 25), which is payable in cases of permanent total disability. Section 29(2) of the Act provides for a minimum weekly amount of $304.36 (as of January 1, 2002, as adjusted pursuant to Section 25) in cases of temporary total disability, "unless the worker's average earnings are less than that sum per week, in which case the worker must receive compensation in an amount equal to the worker's average earnings". Section 23(4) provides that minimum compensation for permanent partial disability must be calculated in the same manner as prescribed by Section 29(2), and Section 30(2) makes the same provision with respect to temporary partial disability.

The Royal Commission described the impact of these statutory provisions on page 51 of its *Final Report*:

> Thus, workers with permanent total disability whose earnings would result in benefits below the minimum receive a fixed minimum amount, irrespective of actual earnings. Workers with lower earnings who experience temporary total, temporary partial, or permanent partial disability will never receive more than their actual earnings loss, but may receive an amount equivalent to their actual lost earnings, rather than the 75% of lost earnings currently mandated in the absence of statutory minimums.

The Royal Commission recommended that the minimum compensation under the Act should be set at a level comparable to that of an individual working 40 hours per week at the minimum wage established by the Provincial Government. (The current minimum wage set pursuant to the Employment Standards Act of BC, as of November 1, 2001, is $8.00 per hour.) The Royal Commission elaborated upon its recommendation on pages 53 and 54 of its *Final Report*:

> The minimum compensation under the Act should be at a level comparable to that of an individual working full time at the minimum wage. That is currently the case, but specifying such a formula in the legislation would make it easier to ensure that this level is sustained in light of any statutory changes affecting the minimum wage. This amount should be guaranteed to workers who have sustained permanent total disability and thus have no opportunity to earn supplementary income. The amount should not be guaranteed in the case of temporary and/or partial disability, but should be used as a benchmark against which to measure compensation. As is the present approach, workers whose compensation would otherwise fall beneath the benchmark would receive compensation for actual lost earnings rather than the 90% of net lost earnings that the commission is recommending elsewhere in this report.

I agree with the Royal commission's recommendations with respect to the minimum compensation which should be paid under the *Act*, with one exception. The pension entitlement for a worker who suffers a permanent partial disability is, in effect, simply a proportion of the amount which the worker would have received had he/she suffered a permanent total disability. I do not perceive any valid reason as to why the determination of the minimum base for the calculation of compensation entitlement for a permanent disability should be any different for a permanent partial disability as compared to a permanent total disability.

Accordingly, I make the following recommendations:

(i) Section 22(2) of the *Act* should be amended to provide that the compensation awarded in the case of a permanent total disability must not be less than an amount equal to that which a worker would earn at the minimum wage established in the Province, working 40 hours per week. (For clarification purposes, my recommendation is based on the utilization of the "standard" minimum wage as set out in Section 15(1) of the *Employment Standards Regulation*, which is currently $8.00 an hour. This minimum wage rate would be used for the calculation of any worker's pension award, regardless of the actual minimum rate which may be applicable to that particular worker pursuant to Part 4 of the *Employment Standards Regulation*.)

(ii) Section 23(4) of the *Act* should be revised to read:

> Where permanent partial disability results from the injury, the minimum compensation awarded must be calculated in the same manner as prescribed by Section 22(2) for permanent total disability, but to the extent only of the partial disability.

(iii) Section 29(2) of the *Act* should be amended to provide that the compensation awarded in the case of a temporary total disability must not be less than an amount equal to that which a worker would earn at the minimum wage established in the Province, working 40 hours per week, unless the worker's average net earnings are less than that sum per week, in which case the worker must receive compensation in the amount equal to the worker's net average earnings.

(iv) No change is required to be made to the existing Section 30(2) of the *Act*.

Finally, I refer to Section #37.21 of the Claims Manual, which provides as follows:

> The statutory minimum only applies in cases where a worker is found to be 100% disabled on a physical impairment basis. It does not apply when the percentage of disability on a physical impairment basis is less than 100% but the worker is found to be totally unemployable under the dual system of measuring disability.

In my opinion, there is no legitimate reason to distinguish, insofar as the application of the statutory minimum is concerned, between a permanent disability award (whether total or partial) which is calculated based upon the loss of function method as opposed to the projected loss of earnings method. Accordingly, it is my recommendation that the WCB

(i) remove Section #37.21 from the Claims Manual, and

(ii) apply the statutory minimum to all permanent pension awards, whether calculated pursuant to Section 22, 23(1) or 23(3) of the *Act*.

E. Maximum Level of Compensation Benefits

Section 33(6) of the *Act* establishes an annual maximum (gross) wage rate for the purpose of calculating a worker's average earnings. This maximum wage rate is adjusted on an annual basis pursuant to Section 33(7). The maximum wage rate in BC for 2002 is $59,600.

The workers' compensation schemes in all other Canadian jurisdictions similarly provide for maximum annual earnings. For 2001, the maximum annual earnings for each of the Canadian jurisdictions was:

Jurisdiction	Max. Annual Earnings
BC	$58,500.00
Alberta	$50,100.00
Saskatchewan	$48,000.00
Manitoba	$53,510.00
Ontario	$60,600.00
Quebec	$51,500.00
New Brunswick	$46,200.00
Nova Scotia	$41,100.00
Prince Edward Island	$38,100.00
Newfoundland	$45,500.00
Northwest Territories/Nunavut	$63,350.00
Yukon	$62,400.00

The Royal Commission recommended the retention of a maximum wage rate within the *Act*, but it also recommended that the calculation of the maximum wage rate should be revised so as to be based on 200% of the average industrial wage rate in BC. I have been advised by the WCB that the average industrial wage rate in BC for the year 1999 was $32,575, and therefore the maximum wage rate, as proposed by the Royal Commission, for 2000 would have been $65,150. Since the maximum wage rate for 2000, pursuant to Section 33(6) of the *Act*, was $58,000, acceptance of the Royal Commission's recommendation would have resulted in an increase of 12.3% to the WCB's maximum wage rate for 2000.

Effective January 1, 2001, Statistics Canada changed the Standard Industrial Classification (SIC) base, which is used to determine the average industrial wage, from the 1980 SIC to the North American Industry Classification Standard. This change has resulted in an upward adjustment in the average industrial wage rate in BC from 1991 onwards.

I have been advised by the WCB that the average industrial wage rate in BC for the year 1999, based upon the revised system implemented by Statistics Canada, was $33,735. Accordingly, the maximum wage rate, as proposed by the Royal Commission for 2000 would have been $67,470, which represents an increase of 16.3% over the actual maximum wage rate in BC for 2000.

Although I am sympathetic to the Royal Commission's view that the maximum level "should be one that reflects the income of a greater number of workers in the higher wage brackets", I do have a concern with raising the existing maximum by such a significant percentage.

I am prepared to recommend that the maximum (gross) wage rate under Section 33 of the *Act* be adjusted annually, as of January 1st, 2002 and each subsequent January 1st, to an amount equal to 190% of the average industrial wage in BC for the calendar year which ended a year and a day earlier. (For example, the maximum wage rate for 2003 would be based on 190% of the average industrial wage rate in BC for 2001.) This time lag is necessary in order for the WCB to effectively be able to determine and implement this adjustment.

I have recommended this formula (using 190% of the average industrial wage in BC) based upon the following considerations:

(i) Pursuant to this recommended formula, the maximum wage rate in BC for 2001 would have increased to $64,100. This proposed adjustment represents an increase of 9.6% over the actual maximum wage rate which was in effect in BC for 2001.

(ii) This adjusted maximum wage rate ($64,100) would have been the highest in any Canadian jurisdiction in 2001.

(iii) The WCB has estimated that approximately 10 to 15% of BC workers earn more than the current maximum compensation level prescribed by Section 33 of the *Act*. Increasing the maximum level pursuant to the formula I have recommended would reduce that percentage by approximately one-half.

F. Waiting Period

When the Workmen's Compensation Act was initially enacted in BC in 1917, it provided for a waiting period for the first three days of disability, during which time no compensation, other than medical aid, was provided to the injured worker. Various amendments have been made to this initial waiting period through the years.

At the present time, Section 5(2) of the *Act* provides:

> Where an injury disables a worker from earning full wages at the work at which the worker was employed, compensation is payable under this Part from the first working day following the day of the injury; but a health care benefit only is payable under this Part in respect of the day of the injury.

There are currently two jurisdictions in Canada which have established waiting periods beyond the day of the injury – New Brunswick and Nova Scotia. The Royal Commission described the manner in which these waiting periods operate in each of these jurisdictions on page 73 of its *Final Report*:

> New Brunswick requires workers to wait for three working days following the date of injury before benefits are paid. (More precisely, the waiting period is three-fifths of the worker's regular work week to account for the fact that some workers do not work a standard five day week. The policy is therefore designed to cause the worker to forego a full three-fifths of their average weekly wage.) The worker cannot receive any work-related remuneration during the waiting period (eg: wages, supplementary pay, vacation pay, sick day pay, etc.). Benefits will not be paid as long as the worker is in receipt of work-related remuneration. The retroactive period in New Brunswick is 30 working days.
>
> Nova Scotia requires a two-day waiting period (or two-fifths of the worker's average weekly wage). As in New Brunswick, the worker cannot receive any work-related remuneration during the waiting period, although this restriction is not in force where an existing collective agreement provides for such remuneration in the event of a work-related injury. Nova Scotia's retroactive period is five calendar weeks.

As noted in the quote above, the New Brunswick and Nova Scotia waiting period provisions both include a "retroactive period" concept. In other words, if the injured worker's disability lasts beyond the indicated "retroactive period", then the worker will be paid the compensation benefits for the length of the waiting period.

The WCB's Briefing Paper identified three potential reasons why a waiting period, beyond the day of the injury, may be adopted (on pages 33 and 34):

(i) Waiting periods are akin to deductibles in insurance policies. They are designed to create a financial incentive for workers to take greater precautions against risk, as loss of income associated with injury becomes less fully insured.

(ii) Waiting periods can serve to reduce benefit costs to the workers' compensation system in the sense that the system does not pay wage-loss benefits for the duration of the waiting period.

(iii) The WCB's administrative costs may be reduced through the provision of a waiting period since the primary adjudication of the claim, for the purpose of determining benefits, may be precluded for work absences that do not extend beyond the waiting period.

Not surprisingly, representatives for employers propose that a two or three day waiting period be adopted in BC, while advocates for labour and disabled workers oppose such a provision.

The Royal Commission rejected the concept of a waiting period beyond the day of the injury. In doing so, the Royal Commission stated the following on page 73 of its *Final Report*:

> Waiting periods do not reduce the costs of workplace injuries unless legislation and policies promote conduct by employers and workers that results in a real reduction in the number of injuries and illnesses, or a reduction in frivolous claims which would otherwise have occupied adjudicators' time. If real costs are not being reduced, then waiting periods are simply a means for shifting costs away from the workers' compensation system and onto individual workers, employers, or both. The commission does not consider the latter an appropriate objective or result.

I agree with the above concerns raised by the Royal Commission. Furthermore, I do not necessarily agree that the WCB's administrative costs would be reduced through the adoption of a two or three day waiting period. In my opinion, adjudication of the worker's claim would still need to be conducted, in order to determine if the injury was work-related, for the following reasons:

(i) to establish whether health care benefits, if required, should be provided to the worker, and

(ii) to confirm that the cause of the injury was in fact work-related, due to the possibility that what might appear to be a minor concern at the initial time of the injury may well develop into a significant problem at some later date.

A related question to be determined is whether the employer should be required to pay an injured worker his/her full wages for the day on which the compensable injury occurs. The Royal Commission responded to this question in the affirmative. The actual wording of the Royal Commission's recommendation (#149) is found on page 74 of its *Final Report*:

> Section 5(2) of the Workers Compensation Act be amended to require the employer to pay an injured worker full wages for the day on which a compensable injury occurs if these wages had been payable had the injury not occurred.

I find the intent of the concluding words "if these wages had been payable had the injury not occurred" to be confusing. Certainly the intent is clear if there is no dispute that the worker's injury "arose out of and in the course of employment" as required under Section 5(1) of the *Act*. In such circumstances, the injury would be compensable, and the employer would be required to pay the worker his/her wages for the remainder of the scheduled work day.

However, there are many examples where the compensability of the work injury is not so clear. For instance, the WCB's Claims Manual provides the following illustration (on page 3-7) of a non-compensable injury which may occur to a worker while at work:

> An office worker goes to work at an office that is located above a store. He walks up one flight of stairs to his office and has a heart attack at the top. The evidence indicates a deteriorating condition of his heart. It indicates that a heart attack would not be unexpected and could be brought on by any activity at all. The disability is the result of natural causes and is not compensable.

Assume that the worker in the above example submits an application for compensation to the WCB. How would the Royal Commission's recommendation apply in such circumstances? I see several potential scenarios.

First, the employer may be required to pay the worker for the remainder of his/her scheduled work day simply due to the fact that the worker submitted an application for compensation. However, if the claim is ultimately denied, does the employer have the entitlement to recover the payment from the worker? If not, would the Royal Commission's recommendations actually be requiring an employer to guarantee such pay for the remainder of the work day, regardless of whether or not the injury was compensable?

Second, the employer may not be required to pay the worker for the remainder of the work day immediately upon the filing of the worker's application for compensation, but instead would defer such payment until a final decision is reached as to whether the injury was compensable. However, the length of time which may elapse before such final determination is reached may take a year or longer, and the worker may not even remain employed with that same employer when the final decision is rendered. Surely this could not have been the intent of the Royal Commission's recommendation.

Third, the concluding words of the Royal Commission's recommendation may well stand for the simple proposition that the employer will only be required to pay the worker if the employer would have paid the worker in the event that a non-compensable injury had occurred. For example, if the employer would have provided sick pay to the worker if the injury had been non-compensable, then the employer would be required to pay the worker the remainder of his/her scheduled shift on a day when the worker suffered a compensable injury. However, this interpretation would then differentiate between those workers who would be entitled to sick pay from their employers for non-compensable injuries, and those workers who would not be so entitled. Once again, it is hard to imagine that this is what the Royal Commission intended by its recommendation.

Practically speaking, I believe the Royal Commission intended the first scenario I raised to be applicable. Any worker who felt he/she suffered a work-related injury, and who therefore submitted an application for compensation, would automatically be entitled to receive payment from his/her employer for the remainder of the work day – regardless as to whether the injury is ultimately determined to be compensable. As I indicated previously, this would result in something akin to universal coverage for a worker who suffers an injury at work (which may not have been related to work). If the Government determines that universal "sick pay" coverage for the day of the injury is appropriate, it is my opinion that such a provision should be included in some other legislation (such as the Employment Standards Act).

Accordingly, it is my recommendation that Section 5(2) of the *Act* remain unchanged.

G. Indexing of Compensation Benefits

Section 25 of the *Act* directs the WCB to adjust periodic payments of compensation twice a year (as of July 1 and January 1) to reflect changes to the Consumer Price Index ("CPI") in BC. The rationale behind such a provision was explained by the Royal Commission on page 69 of its *Final Report*:

> The intention of this section, as understood by the commission, is to ensure that the benefits payable under the Act retain their value over time. Failure to adjust benefits over time would mean that workers and surviving dependants would suffer benefit reductions, not because entitlement has changed, but due to economic circumstances beyond their control. Unlike other workers, injured workers have no option to negotiate with employers for protection from inflation.

Similar cost of living adjustments are made to compensation benefits in every Canadian jurisdiction. The WCB provided information concerning these other jurisdictions on page 30 of its Briefing Paper:

Jurisdiction	**Cost of Living Adjustment**
Alberta	CPI less 0.5%. Annual adjustment.
Saskatchewan	Full CPI. Annual adjustment.
Manitoba	Annual adjustment equal to increase in Industrial Average Wage. Capped at 6%, but may be increased by regulation.

Ontario	Full CPI adjustment for workers with 100% disability and survivors. *All other recipients subject* to an increase equal to [(1/2 x CPI increase) – 1]. Adjustments are not to be more than 4% and not less than 0%. Annual adjustment.
Quebec	A ratio of current year's CPI and previous year's CPI is used. Annual adjustment.
Nova Scotia	50% x change in CPI. Annual adjustment.
New Brunswick	Full CPI. Annual adjustment.
Prince Edward Island	Lesser of 75% of the change in CPI or 4%. Annual adjustment.
Newfoundland	Full CPI. Annual adjustment.
Yukon	Pre-accident earnings x (1 + (2% + (Average Industrial Wage for year/Average Industrial Wage for previous year). Annual adjustment.
Northwest Territories/ Nunavut	Board conducts a review annually. The most recent adjustment was a 2.32% increase effective January 1, 2001.

The Royal Commission recommended that "benefit adjustments should not be less than the full measure of price changes, nor should they occur less frequently than their current semi-annual rate" (on page 69). Both of these recommendations are inconsistent with what currently occur in the other Canadian jurisdictions.

With respect to the frequency of the adjustments, each of the other Canadian jurisdictions have their adjustments occur on an annual basis. I believe an annual adjustment is more reasonable than semi-annual adjustments.

The next question is whether the compensation benefits should be fully or partially protected. A majority of the other Canadian jurisdictions do provide for partial protection only. Three jurisdictions (Saskatchewan, New Brunswick and Newfoundland) provide for full CPI protection, while a fourth jurisdiction (Manitoba) provides for full protection with a maximum cap at 6% (which may be increased by regulation).

As discussed in the "Introduction" section of this Report, I have been convinced that the WCB's financial status is becoming unsustainable. The WCB incurred a deficit (unaudited) in 2001 of $286.8 million. In 2002, the WCB projects a further deficit of $422 million, which will result in the WCB assuming an unfunded liability for the first time in 5 years. Under the current workers' compensation system in BC, this deficit trend is projected to continue, leading to an overall unfunded liability of approximately 1 billion dollars by the end of 2005.

This scenario is simply unacceptable. Appropriate steps must be taken at this time to ensure that this downward trend is "nipped in the bud".

A significant contributor to the WCB's existing financial situation is the full indexing of compensation benefits paid by the BC WCB. As noted above, a majority of Canadian jurisdictions provide for partial indexing protection only.

I believe it is reasonable and appropriate for the BC workers' compensation system to similarly provide less than full indexing protection, particularly in light of the necessity for steps to be immediately taken to relieve the financial distress which the BC system currently faces. Accordingly, I recommend that the periodic payments of compensation made under the *Act* be adjusted on an annual basis based upon the formula of "CPI less 1%".

Furthermore, I believe it is reasonable to cap the maximum amount of the annual CPI adjustment at 4%, in order to provide some degree of certainty for the WCB in calculating its potential future liability associated with such adjustments. In addition, there should be a minimum cap of 0%, to preclude any negative adjustment to the compensation benefits paid to disabled workers.

Accordingly, I recommend that periodic payments of compensation made under the *Act* be adjusted on an annual basis based upon the formula of "CPI less 1%". Such adjustments are not to be more than 4%, nor less than 0%. It is my further recommendation that this new CPI formula would apply prospectively to all existing claims for compensation benefits which are being paid by the WCB, as well as to any future claims for compensation benefits.

The anticipated financial impact of my recommendation, based upon information provided by the WCB, is as follows:

(i) There will be a "one-time" adjustment in the WCB's future claims cost liabilities of approximately $555 million. This amount represents the impact of applying the proposed CPI formula to existing claims which are being paid by the WCB (and which have had the actuarial determinations for future CPI adjustments based upon the current CPI formula set out in Section 25 of the *Act*).

(ii) There will be an ongoing annual reduction of the CPI payments made by the WCB, pursuant to the proposed CPI formula, of approximately $35 million.

H. Other Income Maintenance Benefits

The issue concerning the "stacking" or "integration" of workers' compensation benefits with other income maintenance benefits is appropriately described on page 22 of the WCB's Briefing Paper:

> The Board provides compensation benefits to workers who experience occupational injuries or diseases or, in the case of fatalities, to certain survivors.

> Workers and survivors may also be entitled to benefits from other sources for the same work-related disablement or death. These other sources include the Canada Pension Plan ("CPP") disability benefits, benefits from insurance plans purchased privately by the worker, and benefits from group insurance plans purchased by the employer.
>
> When a worker or survivor receives benefits from two or more sources without any adjustment to reflect the existence of other benefits, there is said to be "stacking" of the benefits. When one benefit is reduced to take into account the receipt of a benefit from another source, there is said to be "integration" between the two types of benefits.
>
> The question arises when, if at all, benefits should be "stacked" and when, if at all, benefits should be "integrated".

I will first consider this issue from the perspective of publicly provided benefits, and then I will address private benefits.

1. Publicly Provided Benefits

The primary focus of other publicly provided income maintenance benefits involves Canada Pension Plan ("CPP") benefits. Under BC's current workers' compensation system, permanently disabled workers who qualify for CPP disability benefits continue to receive their full workers' compensation disability benefits with no deduction being made to take account of the CPP benefits paid to the worker. In other words, the worker's CPP disability benefits are "stacked" upon his/her workers' compensation benefits.

On the other hand, Section 17 of the *Act* requires workers' compensation benefits paid to surviving dependants of deceased workers to be reduced to the extent of CPP benefits which are payable to the dependants as a result of the worker's death. In other words, the dependant's CPP survivor benefits are "integrated" with his/her workers' compensation dependant benefits.

In my opinion, this is an inconsistency which must be rectified. Looking at other Canadian jurisdictions is not that helpful, since there are varying practices with respect to disability payments to workers and survivor benefits to dependants. For example, with respect to CPP and workers' compensation disability payments to injured workers, five jurisdictions provide for full integration, three have partial integration, and the remaining three allow for the stacking of the benefits (with some integration contemplated in Alberta). Turning to CPP and workers' compensation survivor benefits, four jurisdictions provide for integration, one has partial integration, while the remaining seven allow for the stacking of benefits.

The Royal Commission recommended that all CPP benefits should be integrated with workers' compensation benefits, regardless as to whether the nature of the benefits were for disability or survivor purposes. The Royal Commission's reasoning for this recommendation is set out on page 79 of its *Final Report*:

> A further difficulty in this area is the inconsistent treatment afforded to recipients of survivor benefits as opposed to disability benefits. As previously noted, in the former instance CPP benefits are currently integrated and in the latter they are stacked. The commission finds that this inconsistency is without rationale and requires rectification. In the commission's view, all CPP benefits should be integrated with workers' compensation benefits, as long as the CPP benefits are payable as a result of the same injury that gave rise to entitlement to worker's compensation and in respect of the same loss. Like workers compensation benefits, CPP disability benefits are universally available to all Canadian workers on a mandatory rather than optional participation basis and, while not as generous as provincial workers' compensation benefits, they nonetheless provide a "floor" which should constitute the federal plan as first payer.

I am not prepared to accept full integration of workers' compensation and CPP benefits, as recommended by the Royal Commission. The reason for my reluctance is based on the fact that workers are required to contribute to the CPP. Accordingly, the workers, and their survivors, should have an entitlement to receive disability or survivor benefits under the CPP, at least to the extent of the worker's contribution.

On the other hand, full stacking of workers' compensation and CPP benefits disregards the fact that employers are also required to contribute to the CPP for the benefit of their workers. Employers should not be required to compensate workers (or their survivors) twice for the same disability.

Accordingly, it is my recommendation that CPP disability and survivor benefits be integrated with the workers' compensation benefits which are payable as a result of the same injury or death, but only to the extent of the employer's percentage of the overall contribution to CPP. It is my understanding that employers currently pay 50% of the CPP contributions. Therefore, my recommendation would lead to 50% integration of CPP disability and survivor benefits.

The Royal Commission also considered other public income assistance systems, such as social assistance benefits. On page 79 of its *Final Report*, the Royal Commission rejected the integration of such income assistance with workers' compensation benefits:

> Benefits from other social welfare programs, such as income assistance, address other problems in addition to income needs arising from the onset of disability. Social assistance benefits provide support to those whose means fall below a level prescribed by the provincial government. Just because an injured worker is receiving workers' compensation benefits does not necessarily mean that the injured worker is not experiencing the problems that other public programs are intended to address, such as poverty. So long as injured workers still qualify for benefits under these programs, they should not be denied access to the additional support. It may be entirely appropriate for the social assistance agency in its discretion to decide to integrate workers' compensation benefits in whole or part, but the commission considers that the workers' compensation system in this context should be the first payer.

I agree with the Royal Commission on this point.

2. Private Benefits

The discussion concerning the integration/stacking of private income assistance benefits generally falls within one of the following three areas:

(i) private disability or life insurance purchased by the worker;

(ii) private disability or life insurance purchased by the employer for the benefit of the worker; and

(iii) "top-up" clauses in several collective agreements, whereby the employer will top-up the wages of the injured worker beyond the amount of the WCB compensation received by the worker.

With respect to the first two types of private benefits set out above, I fully adopt the following reasoning used by the Royal Commission (on page 76 of its *Final Report*) in rejecting the integration of these private benefits with workers' compensation benefits:

> It cannot be seriously argued that a worker is stacking benefits if the worker has prudently saved wages in a bank account and then draws on those savings to supplement workers' compensation benefits in the event of a work injury. In the commission's view, this is not very different than drawing on benefits from private or group plans intended to cover risks not fully covered by the workers' compensation system. Parties enter into these private arrangements to supplement shortcomings in the workers' compensation system and to meet the risks they perceive. Prudent workers should not be penalized for using part of their income to purchase supplementary insurance instead of other goods or services, or for foregoing other remuneration in exchange for such employer-funded benefits.

The concern expressed by some employers with respect to "top-up" provisions is that they contribute to the over-compensation of injured workers. However, in my opinion this is a private contractual matter between the employer and the trade union with whom the "top-up" provision was agreed. If a particular employer no longer wishes to be bound by a "top-up" clause to which it had previously agreed, its recourse lies at the bargaining table.

Accordingly, my recommendation, with respect to the integration of private income assistance benefits with workers' compensation benefits, is the same as the following "view" expressed by the Royal Commission on pages 76 and 77 of its *Final Report*:

> The commission is of the view that workers' compensation benefits should not be reduced by any supplementary benefits paid through privately arranged or purchased insurance, or through private arrangements whereby an employer pays top-up benefits to the worker. Integrating such benefits would thwart the worker's goal of providing for uninsured risks not covered through the workers' compensation system.

I. Average Earnings

Section 33(1) of the *Act* provides:

> The average earnings and earning capacity of a worker must be determined with reference to the average earnings and earning capacity at the time of the injury, and may be calculated on the daily, weekly or monthly wages or other regular remuneration which the worker was receiving at the time of the injury, or on the average yearly earnings of the worker for one or more years prior to the injury, or on the probable yearly earning capacity of the worker at the time of the injury, as may appear to the board best to represent the actual loss of earnings suffered by the worker by reason of the injury, but not so as in any case to exceed the maximum wage rate, except that where, owing to the shortness of time during which the worker was in the employment of his or her employer, or in any employment, or the casual nature of his or her employment, or the terms of it, it is inequitable to compute average earnings in the manner described in this subsection, regard may be had to the average daily, weekly or monthly amount which, as shown by the records of the board, was being earned during the one or more years or other period previous to the injury by a person in the same or similar grade or class of employment.

Although Section 33(1) is only one sentence (albeit a very, very long one), its importance to the worker's compensation scheme in BC cannot be understated. All of the compensation benefit entitlements set out in Sections 29 and 30 (with respect to temporary disability benefits) and Sections 22 and 23 (with respect to permanent disability benefits) are based upon the "average earnings" of the worker. Pursuant to Section 33(1), the average earnings and earning capacity of the worker must be determined as of the time of the injury. Section 33(1) then identifies three alternatives that may be used in determining the average earnings and earning capacity of the worker, as of the time of the injury:

(i) the daily, weekly or monthly wages or other regular remuneration which the worker was receiving at the time of the injury,

(ii) the average yearly earnings of the worker for one or more years prior to the injury, or

(iii) the probable yearly earning capacity of the worker at the time of the injury.

The WCB is provided with a very broad discretion in determining which alternative to use in any particular claim. On this point, Section 33(1) provides guidance to the WCB to utilize the alternative set out above "as may appear to the board best to represent the actual loss of earnings suffered by the worker by reason of the injury".

For most cases, temporary wage loss benefits paid by the WCB at the outset of the claim are based on the worker's actual rate of pay that he/she was receiving as of the date of injury. The WCB's Briefing Paper describes the application of the "rate of pay at the date of injury" on page 5:

> For most cases, wage loss payments made at the outset of a claim are based on the worker's "rate of pay at the date of injury" (subject to the maximum wage provision of the Act). The phrase "rate of pay at the date of injury " is applied in practice to mean the daily wages that the worker was receiving on the day of injury. Compensation based on this rate continues until the end of the worker's temporary disability, or until an adjustment is made following an 8 week rate review, whichever date comes first.

As noted above, the WCB conducts a "rate review" where wage loss payments based on the worker's "rate of pay at the date of injury" has continued for 8 weeks. This rate review is required pursuant to the published policies of the WCB – not by the legislation. The rationale behind this 8 week rate review is described in Footnote #4 on page 5 of the WCB's Briefing Paper:

> The assumption behind the review is that, while the initial rate may be a good representation of the loss on a short-term claim, there may be irregularities in the long-term work history that must be acknowledged to ensure that the wage rate best represents the long-term loss.

Section #67.20 of the WCB Claims Manual describes the alternatives the WCB Adjudicators may consider in determining what earnings rate best represents the long-term earnings loss suffered by the worker by reason of the injury:

> As part of the Claims Adjudicator's enquiries, information will be obtained as to the worker's long-term earnings prior to the injury. Normally, earnings in the one-year period prior to the injury are obtained and used to reflect the worker's long-term wage loss and the pension rate. In some instances, however, the three-month figure prior to the injury may be used. Its use, however, is generally limited to those situations where there is a relatively fixed change in the worker's earning pattern which is deemed likely to continue into the future. In some instances, the Claims Adjudicator may decide to select the three-year earnings figure prior to the injury. These situations are normally limited to cases where there are extenuating circumstances in the one-year period prior to the injury and therefore the use of that one-year period would be incompatible with the worker's normal historical earnings pattern. This is sometimes occasioned by economic downturns which produce anomalies or irregularities in the earnings pattern of the worker in the year prior to the injury to the extent that they differ from the normal work history. In some exceptional circumstances, the Claims Adjudicator may decide to use the earnings in the five-year period prior to the injury. This, however, is of very limited application and would only apply to those exceptional circumstances where even the use of the three-year period would produce an inappropriate reflection of the worker's normal employment history.

As can be seen from the above excerpt, the WCB initial decision-maker is given considerable discretion in determining the average earnings which best represents the actual loss of earnings suffered by the worker by reason of the injury. As noted on page 7 of the WCB's Briefing Paper:

> This level of discretion has generated a significant volume of appeals and administrative effort associated with wage rate setting.

Upon appeal, the Review Board or Appeal Division Panel is entitled to substitute its judgment for that exercised by the initial decision-maker in deciding which alternative for determining the worker's average earnings best represents the worker's actual loss of earnings. I have a concern which arises when an initial decision-maker is provided with a broad discretion under the *Act*; he/she exercises that discretion in good faith and pursuant to the applicable published policies of the WCB; and he/she is thereafter subject to being overturned on appeal not because his/her discretion was wrongly exercised, but because a subsequent decision-maker exercises his/her own judgment differently.

I perceive two alternatives to address my concern. The broad discretion provided under the *Act* can be narrowed so that the same method of determining average earnings is utilized for most workers, or the scope of review upon appeal from the initial decision-maker's determination can be limited. As will be discussed below, I view the former alternative as being the appropriate approach with respect to the determination of a worker's average earnings.

1. Rate of pay at the date of injury

As noted above, the existing published policy of the WCB requires the worker's actual rate of pay, that he/she was receiving as of the date of injury, to be utilized for the first 8 weeks of temporary disability in most cases. The rationale for using the worker's rate of pay at the date of injury for some specified period of time (as opposed to determining, at the outset of the claim, the average earnings lost by the worker) is that the actual rate of pay is what the worker had been receiving on the date of the injury, and would presumably be the rate of pay the worker would continue to have received but for the injury. I believe this rationale is appropriate and, subject to the exceptions discussed below, should be retained.

The next question to be considered is how long a period of time should the worker's actual rate of pay be used. The Royal Commission observed, on page 29 of its *Final Report*, that "it is necessary to re-assess lost earnings with greater accuracy if a claim extends beyond some established milestone". However, the Royal Commission was unable to obtain sufficient information to determine the optimal time frame for such a review. Nevertheless, the Royal Commission did provide its thoughts on this issue (on page 31):

> Re-assessment of average earnings should occur within a reasonable time frame following the initial fixing of benefits based on time-of-injury earnings, but not so soon after that a re-assessment must be made for every injured worker. Since it is administratively time-consuming, and therefore costly, to arrive at a precise

estimate of average earnings, what must be balanced is the need to pay the accurate loss in a timely fashion, against the administrative costs of doing so.

It is my recommendation that the wage rate review should be conducted after the worker has been in receipt of temporary wage-loss benefits for a period of 10 weeks from the date of injury. I base my recommendation on the following considerations:

(i) Information provided by the WCB indicated that of the total number of claims closed between April 1, 2000 and September 30, 2001, 80% were closed within the first 8 weeks from the date of injury. Accordingly, the wage rate review would have been conducted for the remaining 20%.

During the same period of time, 84% of the claims were closed within the first 10 weeks from the date of injury. Accordingly, moving the wage rate review date (to after 10 weeks from the date of injury) would result in an additional 4% of the claims being closed before the rate review would need to be conducted.

The beneficial impact of this move to a 10 week review is that the WCB would be saved the administrative workload of conducting the rate review for this additional 4% of claimants.

(ii) Pursuant to the existing published policies of the WCB, a further review of the claim file must be conducted by the Case Manager after a period of 13 weeks following the date of injury. The purpose of this review is to determine whether the affected employer should be provided with relief of costs pursuant to Section 39(1)(e) of the *Act*. (See Sections #114.40 and #114.43 of the Claims Manual.)

In my opinion, it is a substantial administrative undertaking to require the Case Manager to conduct two reviews of the claim file on two separate dates. Accordingly, as will be elaborated upon in the section of this Report entitled "Funding the System", I am recommending that the relief of costs review of the claim file similarly be conducted after the worker has been in receipt of temporary wage –loss benefits for a period of 10 weeks from the date of injury.

I acknowledge that the move from the current 8 week wage rate review to 10 weeks is likely to result in an overall increase of compensation costs to some degree. (This expected result is based upon the WCB's previous study from 1995 to 1997, which indicated that a greater percentage of workers have their wage rates reduced upon the wage rate review than do those who have their wage rate increased.) However, it is my opinion that this potential increase in compensation costs for an additional 2 week period is offset by the administrative benefit to the WCB associated with:

(i) a greater number of claim files being closed within this additional 2 week period, thereby removing the necessity of any wage rate review being conducted, and

(ii) the avoidance of the duplication of the Case Manager's administrative effort in having to review the claim file a second time for relief of cost purposes.

The WCB has developed policies to assist in determining the day of injury rate of pay for certain specified workers. For example, Section #66.01 of the Claims Manual considers workers who work variable shifts; while Section #66.02 deals with workers who hold two jobs at the time of the injury. It is my recommendation that the WCB retain the authority to develop and implement published policies with respect to the determination of the day of injury rate of pay received by different categories of workers, as may be specified by the WCB.

As noted previously, there are several exceptions where the initial temporary wage rate for an injured worker should not be based upon his/her rate of pay on the date of injury. These exceptions are:

(i) Casual Workers – Generally speaking, it is inappropriate, due to the sporadic nature of the work performed by a casual worker, to base the initial temporary wage rate on what the casual worker was receiving on the date of injury. The opening sentences of Section #66.13 of the Claims Manual state the following with respect to casual workers:

> The rate of pay of a casual worker at the date of injury is not normally the best representation of the actual loss of earnings. Because of the sporadic employment history of such workers, the Board considers that there is a need to look at the worker's earnings over a longer period time.

I agree with the above, and it is therefore my recommendation that the actual rate of pay on the day of injury not be used to determine a casual worker's entitlement to temporary wage loss benefits. Instead, the average earnings (as discussed below) of the casual worker should be used as the basis for determining the wage rate for compensation purposes. Accordingly, no wage rate review would be conducted by the WCB for casual workers.

It is my further recommendation that the WCB retain the authority to develop and implement published polices with respect to the determination of what category of workers should be characterized as "casual" for the purposes of receiving compensation benefits under the *Act*.

(ii) Personal Optional Protection – The opening paragraph to Section #66.20 of the Claims Manual states:

> The "average earnings" of a person entitled to personal optional protection under Section 2(2) of the Act are the earnings for which coverage has been purchased. There is no 8-week rate review.

I recommend that the above exception to the wage rate review should be maintained.

(iii) Workers with no earnings – Section #66.30 of the Claims Manual reads as follows:

> Persons working without pay are not generally considered as "workers" under the Act. However, there are some exceptional situations of this type which are covered and for which the Act or the Board has specified the earnings on which compensation is to be based.

Sections #66.31 to #66.34 of the Claims Manual then addresses these "exceptional situations". It is my recommendation that the WCB retain the authority to determine the wage rate to be attributed to workers covered by the *Act* who have no earnings on the day of injury.

Finally, I refer to Section #66.10 of the Claims Manual, which states:

> Where it is clear that a worker is permanently totally disabled, wage-loss payments will from the outset of the claim be based on the same wage rate as the pension.

In other words, where a worker suffers an injury which immediately renders him/her permanently totally disabled, the actual rate of pay on the day of injury will not be used to calculate his/her entitlement to compensation benefits under the *Act*. Instead, the average earnings of the worker, as discussed below, would be used at the outset as the basis for determining the worker's earnings for compensation purposes. I agree with the continued application of this policy.

I therefore recommend that the *Act* be revised to provide the following:

(i) Subject to paragraphs (iii), (iv) and (v)(c) below, any temporary wage loss benefits to which a disabled worker is entitled for the initial period of 10 weeks from the date of injury shall be based upon the actual rate of pay earned by the worker on the date of his/her injury.

(ii) The WCB shall be required to conduct a wage-rate review to determine the average earnings for those workers covered by paragraph (i) above who have received temporary wage-loss benefits for a period of 10 weeks from the date of injury.

(iii) The actual rate of pay on the date of injury, as referred to in paragraph (i) above, shall not be used to determine a casual worker's entitlement to temporary wage loss benefits. Instead, the average earnings of the casual worker shall be used as the basis for determining the wage rate for the purpose of providing compensation benefits to the casual worker from the date of his/her injury.

(iv) The average earnings of a person entitled to Personal Optional Protection under the *Act* are the earnings for which coverage has been purchased, and shall be used as the basis for determining the wage rate for the purpose of providing compensation benefits to the person from the date of his/her injury.

(v) The WCB should retain the authority to develop and implement published policies with respect to the determination of:

  (a) the actual rate of pay on the date of injury for different categories of workers, as specified by the WCB;

  (b) the types and characteristics of workers who would be considered as "casual" for the purpose of receiving compensation benefits under the *Act*; and

  (c) the wage rate to be attributed to a worker covered by the *Act* who had no earnings on the day of his/her injury.

2. The determination of average earnings

After the worker has received temporary wage loss benefits for a period of 10 weeks from the date of injury, I have recommended that the WCB must conduct a rate review to determine the worker's average earnings. This determination of average earnings would then be used by the WCB to calculate any further entitlement to temporary wage loss or permanent disability benefits the worker may have under the *Act* from the start of the 11th week (from the date of injury) on. (By way of clarification, a second determination of the worker's average earnings would no longer be conducted when the worker is assessed for a permanent disability award, as is currently the case.)

Pursuant to the existing provision in Section 33(1) of the *Act*, the initial decision-maker utilizes the method of calculating the worker's average earnings which appears "best to represent the actual loss of earnings suffered by the worker by reason of the injury". As indicated at the outset, I have a concern when there are no limits on the scope of review upon an appeal brought by a worker from a decision in which the initial decision-maker, in good faith, exercised the broad discretion provided to him/her in Section 33. In order to address this concern, it is my opinion that the *Act* must provide greater direction to decision-makers with respect to how the average earnings of a disabled worker should be calculated.

As a general rule, I believe it is appropriate to establish the average earnings of a disabled worker on the assumption identified on page 5 of the WCB's Briefing Paper – that future earnings patterns will follow past earnings patterns. However, there will be circumstances where an exception to this general rule will need to be considered, and in those cases the WCB's focus should be on the prospective "earning capacity" lost by the worker as a result of his/her disability. I will return below to the circumstances where I believe this exception will arise.

The general use of this retrospective approach is also desirable from the perspective of the WCB's ability to administratively determine the average earnings of a disabled worker. On this point, I concur with the following observations raised by the Royal Commission on pages 61 and 62 of its *Final Report*. (Although the Royal Commission's comments were made in the context of its discussion concerning the appropriate "earnings replacement rate" to be applied to the worker's net earnings, I believe they are equally applicable to the question as to whether the WCB should generally look retrospectively or prospectively in determining the average earnings of a disabled worker.)

> It can be challenging to estimate the earnings for some workers, even in the short term, and estimates of a worker's earnings in the longer term can be even more difficult. Consider the example of a worker who suffers an injury that leaves him permanently and totally disabled. If that worker is to be compensated for the earnings that he would have received, but will not as a result of his injury, how should this be calculated? One approach could be to assume that the worker would have continued earning the time-of-injury wage until retirement at age 65. While expedient, this estimate would ignore a number of possible positive and negative labour market outcomes that the worker might have experienced. For example, the worker may have received promotions and/or increases in salaries, or had the opportunity to earn overtime premiums during prosperous economic times. Conversely, the worker may have endured periods of part-time employment or unemployment, withdrawn from the labour market for family or personal reasons, or experienced wage reductions. In addition, the worker may have retired earlier or later than age 65.
>
> These and many other contingencies, both positive and negative, can and will vary from claimant to claimant, depending upon a host of factors ranging from the claimant's own circumstances to general economic conditions. These are identified and weighed in the litigation process through an often laborious examination of evidence, frequently including not only evidence about the claimant's own particular circumstances, but also the testimony of expert witnesses on the statistical likelihood of various events occurring irrespective of the injury. As noted earlier in this report, the commission finds that such a process is not feasible in a system of administrative adjudication without incurring both prohibitive cost and prohibitive delay.

Several other jurisdictions have utilized the 12 month period prior to the worker's disability as a benchmark, in one form or another, in determining the average earnings of the worker. (In particular, I refer to Saskatchewan, Quebec, Newfoundland and the Northwest Territories/Nunavut.) In my opinion, the 12 month period prior to the date of injury is, as a general rule, the appropriate time frame upon which the worker's average earnings should be calculated.

Accordingly, I recommend that the Act be amended to provide that, subject to the exceptions specified below, the average earnings of a disabled worker shall be calculated based upon the gross earnings of the worker (up to the maximum earnings level specified in the Act) during the 12 month period prior to the date of the worker's compensable injury, disablement from occupational disease or death.

There are three exceptions which I propose be specified in the Act with respect to the above recommendation. The **first** exception involves a worker who is a learner or apprentice in a trade, occupation or profession at the time of his/her injury, disablement from occupational disease or death. In such circumstances, the average earnings of the worker should be based on the gross average earnings, during the 12 month period prior to the date of the worker's injury, disablement or death, of a qualified person employed at the beginner rate in the same trade, occupation or profession by the same employer or, where there is no person so employed, of a qualified person employed at the beginner rate in the same trade, occupation or profession in the same locality or region.

The **second** exception involves a worker who was in the employment of his/her employer, other than on a casual or temporary basis, for a period of less than 12 months as of the date of the worker's injury, disablement from occupational disease or death. In such circumstances, the worker's average earnings should be based on the gross average earnings, during the 12 month period prior to the date of the worker's injury, disablement or death, of a person of similar status (for example, where the disabled worker was employed on a part-time or seasonal basis) employed in the same grade or class of employment by the same employer or, where there is no person so employed, of a person of similar status employed in the same grade or class of employment in the same locality or region.

Finally, there needs to be a **third** exception which will provide the WCB with the discretion to deal with those extenuating circumstances when the calculation of the worker's average earnings, based on the preceding 12 month period, would, as determined by the WCB, produce an inequitable result. For example, I envision the WCB contemplating the use of this discretionary authority in the following circumstances:

(i) where the WCB is satisfied that, due to the worker's young age or the casual or temporary nature of the worker's employment, the worker's average earnings at the time of the injury do not equitably represent his/her lost earning capacity, or

(ii) the worker is a student holding a part-time or seasonal job at the time of the injury.

In such extenuating circumstances, the WCB should calculate the average earnings based on the amount which, as determined by the WCB, reflects the loss of the worker's probable earning capacity as a result of the injury, disablement or death. However, I wish to emphasize that the WCB's utilization of this "catch-all" discretionary authority is intended to be the true exception, and not the rule.

3. The composition of average earnings

In calculating the average earnings of a disabled worker, the focus is on the worker's gross earnings from employment only (up to the maximum earnings level set out in the *Act*). Section #71.00 of the WCB Claims Manual states that "a worker's average earnings is normally composed of wages or salary". Sections #71.10 to 71.60 address several specific items which may be included or excluded from the composition of a worker's average earnings.

In this part of the Report, I will be considering whether the following three items should be included or excluded from the composition of the average earnings of a disabled worker:

(a) Employment Insurance benefits received by the worker,

(b) Health and Welfare benefit plan and Pension plan contributions made by an employer on behalf of a worker, and

(c) special expenses incurred due to the nature of the worker's employment.

(a) Employment Insurance Benefits

The WCB's existing policy is that Employment Insurance ("EI") benefits received by a worker are not included in his/her average earnings. The WCB's Briefing Paper elaborated upon the WCB's policy on pages 7 and 8:

> One contentious issue that arises when considering the composition of average earnings concerns whether Employment Insurance ("EI") benefits should be included. The Board's policy is that such amounts are not included in average earnings. Further, the period of time during which the income replacement benefits were received are not excluded from the average earnings calculation.
>
> For example, if the Board determined that a worker's wages in the six months prior to the date of a disability was $20,0000 and in the immediately preceding six months the worker had received $12,000 in EI benefits, the Board would conclude that the "average earnings" for the 12 months were $20,000. This as opposed to the alternatives of saying the average earnings were $32,000 ($20,000 wages plus $12,0000 EI benefits) or $40,000 (the wages earned in six months pro-rated to produce an annual rate of $40,000).

Several concerns arise in regard to the potential inclusion of EI benefits as part of a worker's average earnings:

(i) EI benefits cannot be characterized as earnings, since they are not paid to the worker by the employer. Rather they are statutory benefits provided by the Federal Government to workers who are not working for one of several specified reasons.

(ii) EI benefits cannot be included in the assessable payroll of any employer. Accordingly, assessments would not have been paid to the WCB with respect to the amount of any EI benefits included in the average earnings of disabled workers. Nevertheless, the inclusion of EI benefits in the worker's average earnings would increase the amount of the claim costs paid by the WCB – which increased costs would be charged back to employers covered by the *Act*. This would result in a duplication of payments by employers, since they would already have contributed towards the EI costs through their premium payments to the Federal Government.

(iii) If EI benefit payments were included within the average earnings of a disabled worker, the argument could be raised that similar treatment should be given to other benefit payments made to the worker from public or private sources.

On the other hand, it is asserted that the exclusion of the amount of EI benefits from average earnings undervalues the actual earnings of the worker for the relevant period being considered by the WCB, and that this undervaluation is compounded by the WCB's inclusion of the period of time during which EI benefits were paid to the worker.

The Royal Commission considered this issue on pages 57 to 59 of its *Final Report*. In recommending that there should be a limited inclusion of EI benefits in certain circumstances, the Royal Commission stated the following:

> The commission heard the view that some injured workers are disadvantaged by the current policies for considering periods of unemployment in the determination of average earnings. This disadvantage arises from two sources. First, the time period during which a worker is unemployed is not "netted out" of the calculation of long-term average earnings. Second, employment insurance benefits received by the worker during the period of unemployment are not considered to be part of the worker's earnings.
>
> This issue received considerable attention from a working group, which issued a report dated October 26, 1992, entitled *Average Earnings: A Discussion Paper on Proposals of the Average Earnings Working Group to the Governors' Committee on Average Earnings*. The report aptly described the central considerations surrounding this issue:
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> . . .
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> The commission shares the view that Employment Insurance income should be included in the determination of average earnings, but only where there is an established pattern of regular use of employment insurance as a source of income and where it is determined that this pattern would likely have continued into the future. Despite practical difficulties noted by the working group in distinguishing between exceptional and regular periods of unemployment, the commission believes that such an approach is warranted. . . .
>
> Finally the commission also echoes the sentiment of the average earnings working group that the inclusion of Employment Insurance in earnings be treated as a true exception and that this exception not be extended to include other forms of income not paid by the employer.

I believe that the Royal Commission's approach strikes an appropriate balance between the competing concerns described above. In my opinion, most workers who lose their employment and receive EI benefits are not in any different situation than those who lose their employment and do not receive EI benefits. Both groups of workers are unemployed and will need to seek alternate employment opportunities. The EI benefits that are provided to the former group of workers are not "earnings" from employment – they are benefit payments received for a defined period of time from a statutory social insurance program.

Nevertheless, there are workers who are employed in occupations or industries where EI benefit payments are a regular and integral part of their annual earnings. In particular, there are workers who are employed in occupations/industries which have seasonal operations, or which experience recurring temporary shutdowns, that result in short-term periods of unemployment for the workers. This temporary interruption of the worker's employment makes it quite difficult for the worker to find alternate employment during this "lay off" period. In such circumstances, the EI benefits are more akin to income, and form part of the worker's normal earnings pattern.

In my opinion, EI benefit payments should be taken into account in these limited circumstances, as recommended by the Royal Commission. However, rather than focusing on the worker's "regular and established pattern of dependency" on EI benefits, I believe the appropriate focus should be on those occupations/industries where EI benefits are recognized as constituting a regular supplement to the worker's earnings. For example, it is my understanding that EI benefits play a significant role in the fishing industry due to the seasonal nature of the employment. In my opinion, it should be left to the WCB to determine which occupations/industries would have EI benefit payments included in the calculation of the average earnings of their workers.

Accordingly, it is my recommendation that the *Act* be amended to include Employment Insurance benefit payments in the calculation of the average earnings for those workers who receive such payments due to being employed in an occupation or industry which, as determined by the WCB, is expected to result in recurring seasonal or temporary interruptions of the worker's employment.

(b) Health and Welfare/Pension Plan contributions

Section #71.20 of the Claims Manual sets out the WCB's existing published policy with respect to the inclusion of fringe benefit costs as a component of the average earnings of a worker.

> The Board does not include fringe benefits as a component of average earnings. Fringe benefits include, but are not limited to, employment payment for or contributions to CPP, Employment Insurance, retirement, pension, health and welfare, life insurance, training, or other employee or dependent benefit plans.

The Royal Commission addressed this issue on pages 55 and 56 of its *Final Report*:

> Many workers lose more than wages when they are injured. Employment benefits, such as pension plans, supplementary health insurance and dental plans can constitute an important part of the total compensation package. Workers who accept relatively higher proportions of their total compensation in the form of fringe benefits rather than money wages are disadvantaged by a system that takes account only of wages in determining the quantum of benefits. The Section 33 definition of earnings, as interpreted by board policy, does not appear to reflect this change in how workers are paid, but the change is one of

> such magnitude that to ignore it raises serious concerns about equitable compensation by the system for a significant portion of lost remuneration.
>
> Subject to administrative feasibility concerns, fairness requires that the average earnings established for a worker reflect as close to 100% of the worker's remuneration as possible. However, it will often be an extremely onerous and highly speculative task for both employers and the board to calculate the value of fringe benefits for each individual worker.
>
> In Ontario, employers are required to continue to contribute to the worker's employment benefit plan for a period of up to one year following the date of the injury. The kinds of employment benefits subject to this obligation include health care benefits, life insurance and pension benefits. Not included under this obligation are employment insurance and Canada Pension Plan contributions, and vacations and sickness credits (except insofar as these are considered as part of average earnings for calculating benefits).
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> The commission believes that this approach provides a reasonable balance between recognizing the injured worker's loss of employment benefits and the administrative difficulty associated with assigning a cash value to benefits. We note, however, that we do not contemplate that employer-provided perquisites which the worker may perceive as benefits, but which are provided solely for the purpose of performing the duties of the job, such as the use of a company car, need to continue to be provided by the employer following the injury. . . .
>
> While the approach outlined by the commission will ensure that compensation benefits received by the worker more closely approximate the worker's true remuneration package in the short term, the problem is more vexing for long-term claims. In those instances it would often be pure speculation to conclude that such non-income benefits would necessarily have continued for the life of the worker. On the other hand, some recognition for long-term fringe benefits must be made, even if it is an approximation amenable to administrative adjudication. The commission has therefore taken loss of benefits into account as one of several relevant factors in setting the 90% earnings replacement rate, discussed in the next section of this chapter.

The above considerations led the Royal Commission to its Recommendation #141:

> The Workers Compensation Act be amended such that with the exception of
>
> - Canada Pension Plan contributions
> - Employment Insurance contributions
> - Vacation benefits
> - sick leave, and

- other benefits provided to the worker solely for the purpose of performing the worker's job, contributions to a worker's benefit plans be maintained by an employer for twelve months beginning on the date on which the disability arose, or until the worker returns to work, whichever occurs first.

It is my opinion that the Royal Commission has once again struck an appropriate balance with respect to this issue. I note that a similar concept (of benefit plan protection) is found in Section 56(2) of the BC Employment Standards Act in regard to an employee who is on a leave specified in Part 6 of that *Act*. Section 56(2) provides:

> (2) In the following circumstances, the employer must continue to make payments to a pension, medical or other plan beneficial to an employee as though the employee were not on leave or attending court as a juror:
>
> (a) if the employer pays the total cost of the plan;
>
> (b) if both the employer and the employee pay the cost of the plan and the employee chooses to continue to pay his or her share of the cost.

The Ontario legislation referred to by the Royal Commission also contains a provision which requires the employer to maintain its contributions for employment benefits (health care, life insurance and pension benefits) for the disabled worker only if the worker continues to pay his/her portion of the contribution (if any). (See Section 25(1) of the Ontario Workplace Safety and Insurance Act.) In my opinion, the same concept should be incorporated within the BC Workers Compensation Act.

Accordingly, I recommend the *Act* be amended to include the following provisions:

(i) The cost of the employer's contributions for fringe benefits provided to a worker, including contributions to the Canada Pension Plan, Employment Insurance, retirement, pension, health and welfare, life insurance and other employee or dependant benefit plans, shall not be included as a component in calculating the average earnings of the worker.

(ii) Subject to paragraph (iii) below, an employer must continue to make premium contributions to a pension, life insurance or other health and welfare benefit plan in respect of a disabled worker until the earlier of:

(a) the expiry of a period of 12 months from the date of the worker's compensable injury or disablement from occupational disease, or

(b) the date the worker is no longer entitled to receive disability compensation benefits from the WCB arising from a compensable injury or disablement from occupational disease.

(iii) The employer shall be required to make the premium contributions referred to in paragraph (ii) above only in the event that

(a) the employer was making the premium contributions on behalf of the disabled worker on the date when the compensable injury or disablement from occupational disease occurred, and

(b) the disabled worker continues to pay his/her share of the premium contributions, if any, during the period specified in paragraphs (ii)(a) or (b) above.

(c) Special Expenses

The legislation in many Canadian jurisdictions contain a provision which excludes from the worker's average earnings those "special expenses incurred because of the nature of the work". For example, Section 53(2) of the Ontario Workplace Safety and Insurance Act provides:

> The average earnings do not include any sum paid to the worker for special expenses incurred because of the nature of the work.

Surprisingly, none of the legislative provisions define what these "special expenses" are. I presume they would cover such items as tool allowances provided to tradespersons, or safety boot allowances provided to workers who are required to wear safety boots due to the nature of their work, or clothing allowances for workers who are required to wear special apparel for their work.

I recommend that a similar provision be included within the BC legislation, and that the WCB be provided with the authority to determine what would constitute a "special expense".

Chapter 8: OCCUPATIONAL DISEASES

A. Overview

British Columbia has provided workers' compensation coverage for occupational diseases since the initial legislation came into effect in 1917. As noted on page 1 of the WCB's October 4, 2001 Briefing Paper, entitled "Occupational Disease Compensation":

> The number, type and complexity of occupational diseases has increased considerably over the years; however the legislation has remained relatively unchanged. This situation has created challenges for the Board in recognizing emerging occupational diseases and compensating for occupational diseases generally.

These "challenges" for the WCB are elaborated upon in Section #25.00 of the Claims Manual:

> Most compensation cases involve a personal injury where it can readily be determined whether the event or series of events leading to such injury arose out of and in the course of employment. The cause of disease, by its nature, is often more difficult to determine. A common difficulty is distinguishing between an injury and a disease. Even when medical science has identified the cause of a disease in a general sense, it may be difficult to establish with any degree of certainty how and when a worker contracted or developed a disease. Further, workers' compensation does not extend to all diseases, rather only to those that are due to a worker's employment. In these circumstances, determining the extent to which a worker's employment had in producing the disease becomes a critical or central issue.

In this section of the Report, I will be addressing several issues concerning the compensability of occupational diseases. In doing so, I will be referring to the Royal Commission's discussion of the topic, found in Volume II, Chapter 4 of its *Final Report* (entitled "The Scope of Compensation Coverage in British Columbia: Determining Work-Relatedness"), as well as to the WCB's Briefing Paper noted above.

B. Coverage of Occupational Diseases

Section 6 of the *Act* provides that compensation is payable for an occupational disease that is "due to the nature of any employment in which the worker was employed". The first question I have been asked to consider is whether the WCB should continue to cover occupational diseases for compensation purposes?

My response is an unequivocal yes! Although the adjudication and compensation of occupational disease claims can no doubt involve significant challenges, such difficulties by themselves do not justify the exclusion of occupational disease from workers' compensation coverage when the occurrence of the disease is demonstrated to have been caused by the worker's employment.

Complex questions of causality often arise in occupational disease claims due to the fact that:

(i) disease causation is generally multi-factoral, involving elements that are both occupational and non-occupational, and

(ii) a disease is caused by factors that often occur over a lengthy period of time.

Accordingly, the issue is not whether occupational diseases should be covered under the legislation, but rather how such diseases should be covered.

C. Recognition of Occupational Diseases

The *Act* contemplates several methods whereby a disease may be recognized as an "occupational disease" which may then trigger a worker's entitlement to compensation. Section 1 of the *Act* contains the following definition:

> "**occupational disease**" means any disease mentioned in Schedule B, and any other disease which the board, by regulation of general application or by order dealing with a specific case, may designate or recognize as an occupational disease, and "disease" includes disablement resulting from exposure to contamination.

With respect to the first method referred to in the above definition, the WCB may recognize an occupational disease by including it in Schedule B, which sets out a list of diseases and, opposite each disease, a description of a process or industry with which the disease is associated. Pursuant to Section 6(3) of the *Act*, if a worker contracts the disease specified in the first column of Schedule B, and if the worker, at or immediately before the date of disablement from the disease, was employed in the associated process or industry mentioned in the second column, then the disease is "deemed to have been due to the nature of that employment unless the contrary is proved". The WCB's Briefing Paper discusses the impact of the Schedule B recognition as follows (on page 6):

> This is the highest level of recognition and creates an institutional memory to guide adjudication and inform interested parties that the Board has concluded that there is an association between the disease and the described process. Approximately 60 diseases are recognized under this method.

The second method of recognition referred to in the definition – the designation or recognition of an occupational disease by regulation of general application - is described on page 6 of the WCB's Briefing Paper:

> In these circumstances, the disease is recognized as an occupational disease, but no accompanying process or industry is specified. This method of recognition is used when the Board concludes that the disease is sometimes due

> to the nature of an employment covered by the Act, but it does not appear that the disease is more likely to occur in connection with that employment than elsewhere. The desired institutional memory is less specific. The Board currently recognizes 37 occupational diseases by regulation of general application.

The third method of recognition of an occupational disease set out in the definition is "by order dealing with a specific case". This method of recognition is also discussed on page 6 of the WCB's Briefing Paper:

> The Board may also recognize a disease by order dealing with a specific case if the merits and justice of an individual's claim warrants it. Such a disease may not have been previously designated or recognized due to weak or a complete absence of medical and scientific information which causally associates such disease with employment. This method recognizes unique cases without establishing any associated institutional memory.

Finally, Section 6(4)(b) of the *Act* provides the WCB with the discretion to "designate or recognize a disease as being a disease peculiar to or characteristic of a particular process, trade or occupation on the terms and conditions and with the limitations the board deems adequate and proper". There is currently only one disease recognized under this provision – osteoarthritis of the first carpo-metacarpal joint of both thumbs of physiotherapists involved in deep friction massage which placed particular strain on those joints. The usage of Section 6(4)(b) by the WCB is discussed on page 6 of the Briefing Paper:

> This method may be used to designate a disease where expert medical and scientific information is insufficient to cause the Board to include it in Schedule B but is sufficient to cause the Board to state for decision-makers (thus also establishing an institutional memory) that there is a recognized possibility that employment contributed to causation where the worker was employed in a specific trade or occupation.

Subject to the refinements to Section 6(3) and Schedule B of the *Act* that I will propose later in this section, I recommend that the existing methods of recognizing an occupational disease, for compensation purposes, be maintained.

D. How should Occupational Diseases be compensated?

The adjudication of an application for compensation based upon an occupational disease essentially involves the following two questions:

(i) Is there a causal association between the development of the disease and either exposure to the identified substance(s) or employment in the applicable process or industry?

(ii) If the answer to the above question is in the affirmative, was the particular worker's disease causally related to his/her exposure to the identified substance(s) or his/her employment in the applicable process or industry?

The first question is more generic, and is usually based upon consideration of the available medical and scientific evidence. However, with respect to those diseases listed on Schedule B, the first question has been statutorily answered in the affirmative.

The second question is particular to the individual worker's circumstances. Consideration will be given to a variety of factors, such as the amount and duration of the worker's exposure to the identified substance(s); the length of time the worker was employed in the particular process or industry; the available medical evidence concerning the worker's condition; other potential causal factors that may have led to or contributed to the worker's disease; etc. In the case where Schedule B is applicable to the worker, Section 6(3) of the Act deems that the worker's disease is due to the nature of his/her employment, unless the contrary is proved.

For illustration purposes, assume a worker has developed lymphoma, and asserts that his/her cancer was caused by exposure to benzene at work. The first question to be resolved is whether exposure to benzene can causally be associated with the development of lymphoma. Since "the development of lymphoma/prolonged exposure to benzene" is not listed on Schedule B, the answer to this issue will be based upon consideration of the available medical and scientific evidence. The standard of proof, with respect to the acceptance of such a causal association, will be based on the balance of probabilities (ie: the existence of such a causal association is more likely than not, or, in numerical terms, is greater than 50%).

Once a causal association between lymphoma and exposure to benzene is established based on the balance of probabilities, the second question to be decided is whether the particular worker's lymphoma was causally related to his/her exposure to benzene at work. Under the current workers' compensation system in BC, the standard that has been adopted in answering this question is one of "causative significance".

The Royal Commission described the concept of "causative significance" on page 7 of its *Final Report*:

> In terms of the degree of work-relatedness which is required to trigger entitlement to compensation, the essential focus is on whether the worker's employment was of "causative significance." This standard has not been clearly defined. Where there are both employment and non-employment factors at play, it is clearly not necessary that the employment be of 50% or greater significance in order to meet this test. It also appears clear that the employment must be outside the *de minimus* range, or more than tenuously or trivially connected to the harm in issue. Between these two points, there is a considerable grey area in which it is difficult to determine precisely what is necessary to satisfy the "causative significance" test.

The Royal Commission subsequently (on page 20) noted that, under the WCB's current approach, causative significance "requires that work-related factors play more than a trivial or insignificant role, but does not require that they contribute to a degree of 50% or more".

Once it is determined that the work-related factors had causative significance in the development of the worker's disease, then the worker is entitled to receive full compensation benefits as provided under the *Act*. No attempt is made to determine whether other non-occupational factors may also have had causative significance (to a lesser or greater degree in the development of the worker's condition), nor is any apportionment made between any contributory occupational and non-occupational causal factors.

This method of determining whether compensation should be provided for occupational diseases is referred to as the "all-or-nothing" test. If the requisite degree of connection to the employment (ie: causative significance) is met, full compensation entitlement is granted. If not, no compensation is paid to the worker.

The Royal Commission recommended that the standard of "causative significance" be maintained, and that the "all-or-nothing" test should be applied rather than having adjudication based on proportionate entitlement (between occupational and non-occupational causal factors). I do not agree with the Royal Commission's recommendations.

In my opinion, the test of causative significance sets too low a standard upon which to base a worker's entitlement to full compensation benefits under the *Act*. As noted by the Royal Commission, all that must be established, in order to meet the test of causative significance, is that the work-related factors played more than a trivial or insignificant role.

For example, the WCB has accepted claims for lung cancer, pursuant to Section 6(1) of the *Act*, when the causal contribution by way of occupational exposure was determined to be significantly lower than the non-occupational contributory factor of cigarette smoking (by a ratio as large as approximately 80% to 20% in favour of the non-occupational causal factor). I simply cannot accept that the intent of our workers' compensation system in BC was to provide full compensation benefits to a worker with respect to the development of a disease which was 80% attributable to non-occupational causes. In fact, I believe that providing full compensation entitlement in such circumstances is contrary to the wording used in Section 6(1) of the *Act*, which requires compensation to be paid when the disease "is due to the nature of any employment in which the worker was employed". Where both occupational and non-occupational causes have contributed to the development of the worker's disease, in my opinion only that aspect of the disease which can be attributed to the occupational causes meets the requirement of "due to the nature" of the worker's employment.

To base the "all-or-nothing" standard of acceptance, with respect to claims for occupational diseases, on simply having more than a trivial connection to the worker's employment will, in my opinion, result in a potentially significant future liability for the workers' compensation system. There can be no doubt that medical and scientific knowledge is evolving at a tremendous pace. The knowledge available to the medical/scientific community today allows for much greater precision in determining the causal contributors to diseases then was the case 10 to 20 years ago, and the continuing advances in technology and knowledge in the years to come will make such determinations even more precise. I believe that this precision will result in more workplace contributors being identified as causal factors in the development of numerous diseases. To craft a system today which will provide compensation coverage for occupational diseases, without recognizing the advances that have occurred and will continue to occur in the medical/scientific community, would be inappropriate.

Fairness dictates that workers are entitled to receive workers' compensation protection for economic losses that can be attributed to occupational diseases. However, such entitlement must be connected to that aspect of the disease which is causally related to the worker's employment.

I perceive two available alternatives to the existing "causative significance" approach utilized by the WCB. **First**, a "dominant cause" approach could be adopted, whereby full compensation entitlement would be provided when the occupational causes contributed greater than 50% towards the development of the worker's disease. **Second**, an "apportionment" standard would require a determination to be made concerning the occupational and non-occupational causes of the worker's disease. Compensation would only be provided for that portion of the disease which was causally attributed to the worker's employment.

I will now elaborate on each of these two approaches. I will then respond to a third approach which was recommended by the Royal Commission – what it referred to as the "crumbling skull" rule.

1. The "Dominant Cause" Approach

The "dominant" (or "predominant") cause standard is based on an "all-or-nothing" test, but the level at which compensation benefits would be payable to the worker is where the occupational causes represent more than 50% causal significance leading to the worker's disease. If the occupational causes did exceed 50% causal significance, then the worker would receive full entitlement to compensation benefits under the *Act*. If the occupational causes did not reach this level, the worker would not receive any benefits under the *Act*.

The Royal Commission considered the dominant cause standard on pages 12 and 13 of its *Final Report*. In rejecting the adoption of such a standard with respect to the adjudication of occupational disease claims in BC, the Royal Commission noted the following two concerns:

(i) The dominant cause standard imposes too high an onus with respect to the acceptance of a worker's claim for compensation arising from an occupational disease. The Royal Commission elaborated as follows:

> In terms of fairness, there are many circumstances where a worker's disability has come about as a result of multiple factors, but would simply

> not have arisen in the absence of work-related factors. If the predominant cause test were adopted, workers who would not have suffered any disability had it not been for their employment would go uncompensated if other factors were deemed to have played a 50% or greater causal role. In the commission's view, such a result is inconsistent with the basic principle that industry should fund compensation for consequences arising from employment. If a consequence would not have come about had it not been for the employment, it should be compensable.

(ii) In the Royal Commission's view, the dominant cause standard is "administratively unworkable". It stated the following with respect to this concern:

> From an administrative perspective, the predominant cause test assumes that adjudicators will be able to allocate degrees of causal significance among multiple factors. That assumption is, at best, highly suspect.

In response to the first concern raised by the Royal Commission, there is no doubt that the adoption of the dominant cause standard would set a much higher level for the acceptance of an occupational disease claim than is currently the case pursuant to the causative significance approach. However, the essential feature of an "all-or-nothing" system on which to base the provision of compensation is that a line of acceptability must be set somewhere. Although I appreciate the Royal Commission's view that the "greater than 50%" line is too high, and will result in denying any compensation benefits to workers who would receive full benefits under the current system, I maintain my belief that the existing "causative significance" line (i.e.: more than trivial) is simply too low.

The Royal Commission expressed a substantial concern with the potential that no compensation would be paid to workers, who would not have suffered any disability had it not been for their employment, if other factors were deemed to have played a 50% or greater causal role. To a degree, I share the Royal Commission's concern that a worker in such circumstances would receive no compensation benefits. It is this concern which leads me to prefer the "apportionment of causes" approach which I will be discussing below.

However, in response to the Royal Commission's concern, I note that the worker's disability similarly would not have occurred had it not been for the non-occupational causal factors, which had accounted for more than 50% of the causal role leading to the worker's disease. In such circumstances, why should the "all-or-nothing" test fall on the side of full compensation? Is it not also inconsistent to require industry to fund full compensation entitlement for consequences which arose predominantly from non-employment factors?

Turning to the second concern raised by the Royal Commission, I do not doubt that the adjudication of the "dominant cause" approach will provide greater administrative difficulties than encountered under the current "causative significance" standard. However, it is my opinion that the entitlement of compensation benefits under the Act should not be granted (or denied) on the basis of what is the administratively easiest thing to do.

Certainly it would be far simpler to accept every disease claim where the occupational causes played more than a "trivial" role. However, it would be simplest of all to exclude occupational diseases which have multiple causes from any coverage under the Act. Both of these alternatives would be inconsistent with what I believe to be the purpose of workers' compensation legislation – to provide compensation coverage for that aspect of the worker's disease which is due to the nature of his/her employment.

I do not share the Royal Commission's concern that adjudicators will be unable to allocate degrees of causal significance among multiple factors. As with many other decisions currently made by adjudicators, the determination as to whether the dominant cause standard has been met would be based on the medical evidence presented to, or obtained by, the adjudicator. The fact that the dominant cause approach would involve a greater degree of difficulty than other decisions does not mean such a decision cannot be effectively made.

As a final comment with respect to the "dominant cause" standard, I note that such an approach has been adopted in two other Canadian jurisdictions. In particular, the workers' compensation legislation in both Manitoba and Prince Edward Island contain provisions specifying that where a disease is partly due to employment and partly due to other causes, it is compensable only when the evidence establishes that employment was the "dominant cause".

2. The "Apportionment" Approach

Under this approach, adjudicators would be required to determine the occupational and non-occupational factors which had causative significance in the development of the worker's disease. Compensation benefits under the *Act* would then only be provided for the portion of the worker's disease that was attributable to the occupational factors.

The Royal Commission rejected the apportionment approach to compensating occupational disease claims. In doing so, it stated the following on page 15 of its *Final Report*:

> The commission is of the view that apportioning degrees of disability between multiple causes is generally unworkable for the same reasons that the predominant cause is unworkable and unrealistic. Where a variety of factors have contributed to a disability, there is often no reasonable, scientific method of apportioning the degree to which each factor is responsible for the severity of symptoms. Such an apportionment is apt to lead to arbitrary results and frequent appeals. The commission is therefore of the view that proportionate entitlement adjudication should be replaced by a simpler "all or nothing" test.

For the reasons I described when considering the dominant cause standard, I do not agree with the Royal Commission's view that the apportionment standard is "unworkable and unrealistic". Although I do acknowledge that the apportionment test would involve a greater degree of adjudicative difficulties than would exist in the dominant cause approach (due to the need for the adjudicator in the former case to make the additional determinations concerning what factors – occupational and non-occupational – had causative significance in the development of the worker's disease, and to what degree), I once again believe that adjudicators will be able to reach such decisions on the basis of the medical evidence presented to, or obtained by, them.

As noted previously, I do prefer the apportionment approach over the dominant cause standard. The reasoning for my preference is as follows:

(i) The apportionment approach most closely reflects my perception of the purpose of the Act – to provide compensation entitlement for that aspect of the worker's disease which is due to the nature of his/her employment.

(ii) The apportionment approach would provide some compensation benefits to all workers who would currently be entitled to receive such benefits pursuant to the causative significance approach. However, the amount of the compensation entitlement would be based upon the degree to which the occupational factors had causative significance vis-à-vis the non-occupational contributing factors.

(iii) I believe the apportionment approach is the most appropriate in order for the workers' compensation system to be able to accommodate the anticipated advances in medical/scientific technology and knowledge with respect to findings concerning occupational and non-occupational causes of diseases.

Accordingly, I recommend that the workers' compensation legislation provide for the apportionment of compensation entitlement based upon the portion of the worker's disease which was causally related to occupational, as opposed to non-occupational, factors. I will return shortly to the issue as to how I perceive this apportionment approach should work.

3. "Crumbling Skull" Rule

As noted previously, the Royal Commission recommended that the existing "causative significance" approach should be maintained with respect to the adjudication of occupational disease claims, and that the "all-or-nothing" test should be applied in determining a worker's entitlement to compensation benefits under the Act. However, the Royal Commission felt that such entitlement for permanent disabilities should be limited in those circumstances where the "crumbling skull" principles were applicable. The "crumbling skull" rule flows from tort law, whereby a plaintiff who would have been disabled to some degree in any event by virtue of a pre-existing condition is compensated only for the extent to which the condition is worsened as a result of the tort.

The Royal Commission described how the "crumbling skull" principles would be applied within the workers' compensation system on pages 14 and 15 of its *Final Report*:

> ..., the focus of inquiry in multi-causal situations should be on the extent to which a worker's symptoms would have been experienced anyway in the absence of

> work-related causal factors. If the worker would have experienced no disability in the absence of work-related factors, full compensation should be payable. That result is warranted on thin skull principles. If the worker would have experienced the same degree of disability in the absence of work-related factors, no compensation should be payable. That result is warranted on the basis that work-related factors were not of causative significance in bringing about the disability.

The adoption of the "crumbling skull" principles led the Royal Commission to its Recommendation #179, as set out on page 16:

> 179. Section 5(5) of the Workers Compensation Act be amended to provide that in the case of permanent disability:
>
> a) (subject to (b), below) where a disability occurs as a result of occupational disease or personal injury arising out of and in the course of employment, compensation is payable under this Part unless it is determined that such disability would in any event have occurred as a result of factors unrelated to such injury or disease; and
>
> b) where disability occurs as a result of occupational disease or personal injury arising out of and in the course of employment, compensation is payable for the period between the date on which disability occurred and the date on which it would have occurred in the absence of the occupational disease or personal injury.

I plead ignorance with respect to how the "crumbling skull" principles are applied in the context of a fault-based, adversarial tort action involving two (or more) interested parties. However, I have great misgivings as to whether the Royal Commission's recommendations on this point are workable within the workers' compensation system.

In particular, I find it difficult to see how the adjudicator will obtain credible evidence as to when the worker's disability would have occurred in the absence of occupational factors. Once the disease has been diagnosed, the worker's attending physician/specialists are focused on the treatment of the worker's condition – not on speculating as to if and/or when the disease may have manifested itself in the future had a particular occupational causal factor not been present.

I previously had recognized the adjudicative difficulties which will exist if the apportionment approach is adopted. However, the apportionment test would require the adjudicator to consider the available medical evidence and to make a retrospective determination with respect to the causative significance to the worker's disease of the relevant occupational and non-occupational factors. By contrast, the adoption of the "crumbling skull" rule would appear to require the adjudicator to look prospectively from the date of the manifestation of the worker's disease to determine a hypothetical date on which the disease would have otherwise occurred in the absence of any occupational causal factors.

Such a prospective view may well have a place within the tort system, where the focus is on fault and is limited to the particular parties before the Court. It may well be worth the while for a defendant to expend money within an adversarial system to obtain an expert's opinion as to whether the plaintiff's disabilities would have manifested themselves at some future date regardless of the defendant's action. However, in my opinion it is impractical to require an adjudicator to perform such a role within the no-fault, inquiry-based workers' compensation system.

E. The "Apportionment" Approach

In this section, I will elaborate upon how I perceive the "apportionment" approach working in regard to providing compensation benefits to workers who contract occupational diseases.

1. Levels of Apportionment

Although the adjudication of occupational diseases will continue to have its share of difficulties, it is important to develop an apportionment system which is fairly simple to utilize. Accordingly, once it is determined that occupational factors had causative significance with respect to the development of the worker's disease, I recommend that there be the following four levels of apportionment between occupational and non-occupational factors:

Percentage Attributed to Occupational Factors	Percentage Attributed to Non-Occupational Factors
25%	75%
50%	50%
75%	25%
100%	0%

I have recommended the above 4 levels based upon the following considerations. The difference in the percentage of apportionment between each level must be sufficiently large so as to objectively distinguish one level from the next. The greater the number of levels, the more discretion which must be exercised by the initial decision-maker in determining the appropriate level of apportionment between the occupational and non-occupational causal factors. In my opinion, this will lead to a greater number of appeals being brought requesting the subsequent decision-maker to reach a different conclusion with respect to the appropriate level of apportionment to be applied in the particular case.

On the other hand, if less than 4 levels are utilized, the differences between the levels would be too great, and would impede the ability of the WCB to fairly apportion the disease's causation between its occupational and non-occupational factors. Limiting the apportionment to 2 or 3 levels would, in many cases, result in a significant undercompensation or overcompensation of the worker for that aspect of the disease which is causally attributed to his/her employment.

It is my belief that the 4 levels of apportionment I have recommended achieves a reasonable balance between these competing concepts, and also meets my objective of developing an apportionment system which is fairly simply to utilize.

2. Causative Significance

The standard for determining whether an occupational factor played a role in the development of the worker's disease will continue to be based on "causative significance" under the apportionment system. In other words, provided that the occupational factor under consideration had more than a trivial or insignificant connection to the development of the worker's disease, the standard of causative significance will be met.

If the occupational factors did not have causative significance in the development of the worker's disease, then no compensation benefits would be payable under the *Act*. If the occupational factors did have causative significance, then the worker would receive a minimum apportionment of 25% of whatever compensation benefits he/she was otherwise entitled to under the *Act*. The actual apportionment level applicable to that worker would depend on whether there were any non-occupational factors which were also found to have had causative significance (ie: the same standard of causation) in the development of the worker's disease.

If there were no non-occupational factors which had causative significance in the development of the worker's disease, then the worker would receive 100% apportionment of whatever compensation benefits he/she was otherwise entitled to under the *Act*. If there were non-occupational factors which had causative significance, then the adjudicator would have to apportion the causal impact between the occupational and non-occupational factors, based on the four levels of apportionment specified above.

I will illustrate the above comments by considering the following three scenarios:

(i) A worker develops lung cancer which was attributed to both workplace exposures and to cigarette smoking. Assume that the available expert evidence indicated that the occupational exposure represented 20% causation of the worker's cancer, and that cigarette smoking represented the remaining 80%. In such circumstances, the worker's entitlement to compensation benefits under the *Act* would be apportioned based on the minimum 25% level.

(ii) The Appeal Division previously accepted claims submitted by firefighters for brain cancer. Such acceptance was based upon epidemiologic evidence which supported the finding of a causal association between the occupation of firefighting and the development of brain cancer. Assume that there was no evidence of the particular firefighters having any other known non-occupational factors which could have led to the development of their brain cancer. In such circumstances, their entitlement to compensation benefits under the *Act* would be apportioned based on the maximum 100% level.

(iii) A worker develops malignant melanoma on his/her neck. Assume the worker had prolonged exposure to solar ultra-violent light, both through his/her employment and through personal extensive sun tanning on summer weekends and winter vacations. Upon finding that both the occupational and non-occupational exposures had causative significance in the development of the worker's melanoma, the adjudicator would have to determine the appropriate apportionment based on the available evidence. If the adjudicator determines that both the occupational and non-occupational exposures were relatively equal contributing factors, the worker's entitlement to compensation benefits under the *Act* would be apportioned based on the 50% level.

I must emphasize that, once occupational factors are found to have had causative significance in the development of the worker's disease, it would not be appropriate for the decision-maker to speculate as to whether any non-occupational factors had causative significance. The decision, with respect to whether the occupational and/or non-occupational factors had causative significance, must be based upon the proper consideration of the available medical/scientific evidence.

Finally, I acknowledge the concern that the adoption of the apportionment approach will, in many cases, result in greater consideration being given to the worker's personal background and lifestyle. However, it is my opinion that this examination into the worker's personal life is an inherent and necessary aspect of the adjudication of occupational disease claims which simply cannot be avoided if a fair level of compensation is to be provided to the worker.

3. Which Benefits under the *Act* should be apportioned?

The intent of the apportionment approach is to provide compensation coverage to a worker only for that aspect of his/her disease which is causally related to his/her employment. Acceptance of this concept dictates that the applicable level of apportionment should be applied to any entitlement the worker may have under the *Act* to either temporary wage loss payments or a permanent pension award arising from his/her occupational disease.

For example, assume a worker develops lung cancer from which he/she is totally disabled. The adjudicator determines that the causal factors of the worker's cancer should be apportioned 50% to occupational exposures and 50% to non-occupational exposures. In such circumstances, the worker's entitlement to full wage loss and pension benefits under the *Act*, due to his/her total disability, would be apportioned to 50%.

By way of a further example, assume a worker develops bladder cancer, resulting in the removal of his/her bladder. The adjudicator determines that the causal factors of the worker's cancer should be apportioned 75% to employment exposures and 25% to cigarette smoking. Assume the worker subsequently returns to employment at a lower paying sedentary job, and therefore would be otherwise entitled to receive a 30% loss of earnings pension award from the WCB. In such circumstances, the worker's entitlement to full temporary wage loss payments, and to the subsequent 30% loss of earnings pension award, would both be reduced by the 25% apportionment attributed by the adjudicator to the non-occupational causal factor of cigarette smoking.

With respect to the payment of health care benefits which are allowed under the *Act*, the WCB should continue to be responsible for 100% of the costs of these benefits once it is determined that occupational factors had causative significance, to some degree, in the development of the worker's disease. In other words, I would not recommend the apportionment of health care benefits paid pursuant to the *Act*. My reasoning on this point is premised on the fact that the health care benefit costs would be incurred by the worker in regard to the overall treatment of his/her disease. Since the disease was at least partially attributed to the worker's employment, the WCB should be responsible for funding the health care costs incurred by the worker arising from his/her disease.

Finally, I similarly recommend that there should be no apportionment with respect to any vocational rehabilitation services that the worker may receive from the WCB once it has been determined that the worker's disease was causally related, at least in part, to the worker's employment. However, any wage loss/income continuity component associated with the provision of vocational rehabilitation services would be apportioned in the same manner as temporary wage loss payments discussed above.

4. The need for published policies

As the apportionment approach will be unique to BC amongst Canadian jurisdictions, there will be an obvious need for the WCB to develop published policies with respect to the adjudication of occupational diseases. Furthermore, I would expect the WCB to be vigilant in regard to conducting an ongoing review and revision of these policies in order to readily address any unanticipated issues that may arise through experience with the apportionment approach.

For example, the WCB should develop (and update) causation models for specified occupational diseases based on current (and future) scientific/medical knowledge. Furthermore, I anticipate that the WCB will develop policy guidelines for decision-makers with respect to determining which level of apportionment should apply in those claims where both occupational and non-occupational factors are found to have had causative significance in the development of the worker's disease. By way of illustration, the WCB could decide to establish an inference that 50/50 apportionment should occur where both occupational and non-occupational factors had causative significance, unless the evidence demonstrates, on a balance of probabilities, an alternate apportionment.

F. The "Economic Test" for Occupational Diseases

The first sentence of Section 6(1) of the *Act* reads as follows:

> Where
>
> (a) a worker suffers from an occupational disease and is thereby disabled from earning full wages at the work at which the worker was employed or the death of a worker is caused by an occupational disease; and
>
> (b) the disease is due to the nature of any employment in which the worker was employed, whether under one or more employments,
>
> compensation is payable under this part as if the disease were a personal injury arising out of and in the course of that employment.

The requirement in Section 6(1)(a), that a worker suffering from an occupational disease must be "thereby disabled from earning full wages at the work at which the worker was employed", is often referred to as the "economic test" which must be met by a worker in order to be entitled to compensation benefits (other than health care benefits). The question I have been asked in my Terms of Reference is should the current economic test remain for occupational diseases.

My answer is yes, whether the adjudication of the occupational disease is conducted under Section 6(1) or 6(3) of the *Act*. As I had discussed previously in the Overview of the "Benefits" section of this Report, the focus of the workers' compensation system, with respect to providing compensation benefits to a disabled worker, is on fair protection against economic loss arising from a work-related injury or illness. In order to receive temporary wage loss benefits or a permanent pension award, a worker must have suffered an economic loss as a result of a work-related injury or an occupational disease.

Three concerns have been raised with respect to the utilization of the economic test in Section 6(1)(a) of the *Act* with respect to occupational diseases:

(i) It is asserted that the economic test for occupational diseases is inconsistent with the entitlement provision in Section 5(1) of the *Act* for injuries.

(ii) An anomaly arises due to the application of the economic test in the following scenario. A worker is disabled from work due to an occupational disease one week prior to his/her retirement. Pursuant to Section 6(1)(a), as interpreted by the Appeal Division in several cases, the worker will be entitled, if he/she suffers a permanent disability arising from the occupational disease, to receive a permanent pension award pursuant to Section 23(1). However, if the same worker's occupational disease became disabling one week after his/her retirement, no pension benefits would be paid by the WCB.

(iii) Where an occupational disease initially becomes disabling after his/her retirement, no compensation (other than health care benefits) is payable to the worker. However, if the retired worker subsequently dies as a result of his/her occupational disease, his/her dependant(s) would be entitled to survivor compensation benefits.

I would like to respond to each of these concerns. **First**, I do not perceive the economic test in Section 6(1)(a) to be inconsistent with the entitlement provision in Section 5. To the contrary, I believe that a worker's entitlement to compensation benefits as a result of a work-related injury is similarly based on an economic test. In particular, I refer to Section 5(2) of the *Act*:

> Where an injury disables a worker from earning full wages at the work at which the worker was employed, compensation is payable under this Part from the first working day following the day of the injury; but a health care benefit only is payable under this Part in respect of the day of the injury.

Section 5(2) uses the same "economic test" wording for an injury as is found in Section 6(1)(a) for an occupational disease – ie: where an injury disables a worker "from earning full wages at the work at which the worker was employed". If the injury did not disable the worker from earning full wages, no compensation benefits would be payable to the worker.

In my opinion, the distinction between Sections 5 and 6 is not based on the "economic test" (or the lack thereof), but rather is based on the essential difference which exists between the nature of an injury as opposed to a disease. An injury is generally attributed to, or is the consequence of, a specific event or trauma or a series of specific events or traumas. The disablement which arises from an injury generally occurs at the time of, or in close proximity to, the occurrence of the trauma. Accordingly, the economic test in Section 5(2) (of being disabled from earning full wages) will generally be met shortly after the trauma occurs and, accordingly, is rarely an issue in the adjudication of a worker's claim.

By contrast, a disease is often multi-causal and may, because of latency periods, require a lengthy period of time to manifest itself as a disability. It is for this reason that the economic test in Section 6(1)(a) may not be met – ie: a disease arising from occupational exposures during a worker's working years may not manifest itself into a disability until after the worker has retired. Hence, no disablement from earning full wages has occurred.

The **second** concern is based on the anomaly which arises when a worker suffers a disabling disease one week before retirement versus one week after retirement. In the former scenario, the worker will currently receive a permanent pension award for life. In the latter situation, no compensation benefits will be paid.

This anomaly arises from the timing of the worker's disability. In the first scenario, the worker has met the economic test, since he/she was disabled from earning full wages at his/her employment, albeit only for a period of one week. However, once the economic test is met, the worker is entitled to receive compensation benefits under Part 1 of the

Act. This includes any pension award that may be payable to the worker pursuant to Section 23(1) – which requires such payments to be continued "during the lifetime of the worker". In the case of the permanent disability arising after the worker retires, the economic test is not met, and therefore no compensation is payable.

An issue has arisen as to whether a disabled worker must meet the "economic test" in Section 6(1) of the *Act* on two separate occasions – the first time in order to receive any temporary wage loss benefits pursuant to Section 29 or 30 of the *Act*, and a second time prior to receiving any pension award under Section 22 or 23. This issue has been considered by the Appeal Division on a number of occasions. In Decision #00-1188 (2000), 16 WCR 197 (chaired by the current Chief Appeal Commissioner), the Panel described the issue on page 208:

> An issue raised by the President's referral is the number of times section 6(1) must be applied in a specific case. The memorandum by the Client Services manager attached to the memorandum from the President accepts that the worker "met the requirements under Section 6(1) for the two periods of temporary disability prior to his retirement". However, the submission goes on to state that the worker "must again fulfill the requirements under Section 6(1)" before a pension can be paid.

The Panel disagreed with this interpretation of the *Act*. In doing so, the Panel stated the following on pages 208 and 209:

> Once a worker has demonstrated entitlement to compensation for an occupational disease under Section 6(1), there is no requirement in the Act or anywhere else for the worker to go back through section 6(1) in order to obtain a pension, for example. Once the basic entitlement has been established, a claim for compensation is adjudicated for wage loss, rehabilitation matters, pension and other kinds of compensation under the Act. In this regard we do not see why an application for an occupational disease should be treated any differently than an application for a personal injury (which, incidentally, includes the language at issue in this case in section 5(2)). This analogy to entitlement to personal injury claims is expressly set in section 6(1) of the Act. The memo attached to the submission on behalf of the President accepts that the first two periods of temporary disability prior to the worker's retirement in this case satisfy the requirements of section 6(1). In our view there is no further application of section 6(1) once its requirements have been met. The next legal step is to consider what form of compensation is payable and there is no requirement or need to re-determine entitlement pursuant to section 6(1).

I fully concur in the above reasoning of the Appeal Division. Accordingly, I recommend that the WCB revise its published policies to clarify that once a disabled worker has established entitlement, pursuant to Section 6(1) of the *Act*, to receive temporary wage loss benefits from the WCB, there is no requirement for the worker to have to re-establish that entitlement pursuant to Section 6(1) prior to receiving any pension award to which he/she may otherwise be entitled under Section 22 or 23 of the *Act*.

The **third** concern is based on yet another anomaly. When a worker initially becomes permanently disabled from an occupational disease after his/her retirement from employment, no compensation benefits will be paid. However, if the retired worker subsequently dies as a result of the same occupational disease, his/her dependants will receive survivor compensation benefits from the WCB. However, this anomaly arises due to the wording used in Section 17, which appears to require compensation benefits to be paid to the dependants regardless of the status of the worker at the time of his/her death. I have addressed this anomaly elsewhere in this Report under the heading of "Survivor Benefits".

G. Section 6(3) and Schedule B of the *Act*

As noted previously, Section 6(3) of the *Act* provides that if a worker contracts the disease specified in the first column of Schedule B, and if the worker, at or immediately before the date of disablement from the disease, was employed in the associated process or industry mentioned in the second column, then the disease is "deemed to have been due to the nature of that employment unless the contrary is proved". There are several issues involving Section 6(3) and Schedule B which I will address in this section.

1. Should Schedule B be maintained?

Section #26.01 of the Claims Manual explains how a disease becomes listed in Schedule B:

> The Board lists a disease in Schedule B in connection with a described process or industry whenever it is satisfied from the expert medical and scientific advice it receives that there is a substantially greater incidence of the particular disease in a particular employment than there is in the general population.

The purpose of Schedule B is then described in Section #26.21 of the Claims Manual:

> The fundamental purpose of Schedule B is to avoid the repeated effort of producing and analyzing medical and other evidence of work-relatedness for a disease where research has caused the Board to conclude that such disease is specific to a particular process, agent or condition of employment (see #26.01). Once included in Schedule B, it is presumed in individual cases that fit the disease and process/industry description that the cause was work-related. A claim covered by Schedule B can be accepted even though no specific evidence of work relationship is produced. A review of the available medical and scientific evidence would establish a likely relationship between the disease and the employment. The listing in the Schedule avoids the effort of producing the evidence in every case.

The Royal Commission was of the view that Schedule B should be maintained. Its reasoning is set out on page 17 of its *Final Report*:

> Although such schedules and presumptions are not universally employed in other Canadian jurisdictions, the commission is of the view that the current system provides a fair and effective means of assessing the causal connection between certain diseases and industries, while promoting administrative efficiency by avoiding the need for duplication of effort among adjudicators on the general issue of whether medical and scientific evidence establishes such connections. Given the likely volume and complexity of such evidence, substantial savings are likely to result from eliminating repetitious inquiry into the same general issues. A further by-product of the current approach is greater consistency in decision making.

I am also of the view that Schedule B should be maintained, for the reasons enunciated by the Royal Commission.

2. Section 6(3) – "at or immediately before"

In order for the presumption of work-relatedness to apply, Section 6(3) requires that the worker must be employed in the industry or process specified in Schedule B "at or immediately before the date of disablement" from the occupational disease. This wording has been in the legislation since its initial enactment in 1917.

One of the deficiencies of this early legislative provision being applied in more modern times is that the "at or immediately before" requirement does not contemplate long latency periods that are associated with certain types of diseases, such as cancer. The WCB attempted to address this deficiency by adopting the following published policy (in Section #26.21 of the Claims Manual) in 1995:

> The words "immediately before" used in Section 6(3) are intended to deal with those situations where someone has been employed in the process or industry described in the Schedule, and has left that employment a very short time prior to the onset of the disease. An exception to this is where the medical and scientific evidence has established that there is a long latency period between exposure to the process, agent or condition of employment and the time the disease first becomes manifest. Individual judgment must be exercised in the circumstances of each claim to determine the meaning of "immediately before" having regard to the medical and other evidence available. For example, the manifestation of an infection caused by staphylococcus aureus or of a respiratory irritation resulting from the inhalation of an irritant gas can be expected to occur within a short period of time following the relevant exposure. In the circumstances of such a claim, the presumption would normally be considered only where the condition became manifest within a short period of time following the exposure. However, in a claim filed by a worker who suffers from a recent onset of a cancer listed in Schedule B but who has not worked in the process or industry described opposite such cancer for a number of years, it may be appropriate to conclude that such worker was employed in such process or industry "immediately before the date of disablement" by virtue of the long latency period which is known to exist with respect to such a cancer.

Subsequent decisions of the Review Board and the Appeal Division have determined that it was not viable to interpret the words "at or immediately before" in Section 6(3) so as to include a long latency period. Accordingly, it was held that the WCB's revised policy was invalid as being contrary to Section 6(3) of the _Act_.

In my opinion, it makes little sense to list diseases such as cancer on Schedule B if the lengthy latency period associated with that disease is not specifically recognized in Section 6(3). On this point, I agree with the views of the Royal Commission as expressed on pages 27 and 28 of its _Final Report_:

> The commission considers that as a general rule, it is appropriate to require some reasonable time limit between the exposure and the onset of disease. The longer the lapse of time, the more intervening factors may become relevant and the less clear the connection between the disease and the process or industry may become. The lapse of time should not operate to defeat a worker's entitlement to compensation, but it may well make it less appropriate to address the causation issue by beginning with the Section 6(3) presumption of causation.
>
> However, the commission is also of the view that it is appropriate to create exceptions to such general time limits where medical or scientific evidence warrants doing so. The commission agrees with the Appeal Division that the current *RSCM* policy appears to conflict with a plain reading of Section 6(3) as it is currently drafted. "Immediately before the date of disablement" would not appear to include a situation where exposure occurred many years before the date of disablement.
>
> The current *RSCM* policy, in the commission's view, allows for application of the Section 6(3) presumption in many instances where the presumption is most useful and consistent with the underlying purposes for which it was designed. These include circumstances where there is a sufficiently strong connection between industry and disease to warrant inclusion in Schedule B, and where there is proven to be a long latency period between exposure and onset.
>
> It was noted by counsel representing organized labour that, for example, many of the cancers listed in Schedule B are known to have lengthy latency periods, and that if Section 6(3) is read literally, the presumption would only apply with respect to those workers who are still employed in the process or industry in question at the time the cancer manifests itself. The commission does not believe that it makes sense for the presumption to apply so narrowly. Changing jobs and occupations is common practice in the modern workplace and limiting the presumption to that extent would mean that the same evidence which went into the making of the Schedule B designation would have to be canvassed in detail in a great many individual cases. That is apt to create considerable and unnecessary delay, expense and consumption of the system's resources, as well as the risk of inconsistence in decisions.

Accordingly, I make the following recommendations:

(i) The requirement in Section 6(3), for the worker to be employed in the specified process or industry "at or immediately before the date of disablement", should be amended to expressly incorporate a long latency period which is known to exist between exposure and onset of the particular disease listed on Schedule B.

(ii) Schedule B should be revised, with respect to those diseases in it which are known to have a long latency period, so as to specify the maximum length of time that the worker could have been away from the identified process or industry in order for the Section 6(3) presumption to still be applicable. For example, if the recognized latency period for a particular cancer is 10 to 15 years, then a worker who had been employed within the specified process or industry within 15 years from the date of disablement from the disease would be covered by the presumption in Section 6(3). If the period of time away from the specified process or industry is greater than 15 years, then the presumption would not apply, and the claim would be adjudicated pursuant to Section 6(1) of the *Act*.

3. Section 6(3) – "unless the contrary is proved"

Section 6(3) of the *Act* creates a presumption in favour of a worker's claim for compensation arising from an occupational disease when that worker's situation is covered by Schedule B – ie: the worker has contracted a specified disease as a result of working in a particular process or industry listed in Schedule B. However, it is clear that the Legislature intended the presumption to be rebuttable. Section 6(3) provides that the Schedule B presumption in favour of work causation will apply "unless the contrary is proved".

Section #26.21 of the Claims Manual describes how, in theory, this rebuttable presumption is intended to be applied:

> Inclusion of the words "unless the contrary is proved" in Section 6(3) means that the presumption is rebuttable. Even though the decision-maker need not consider whether working in the described process or industry is likely to have played a causative role in giving rise to the disease, they must still consider whether there is evidence which rebuts or refutes the presumption of work-relatedness.
>
> The standard of proof to be applied in determining whether the presumption has been rebutted is proof on a balance of probabilities. This is the same basic standard of proof applicable in the workers' compensation system. If the evidence is more heavily weighted in favour of a conclusion that it was something other than the employment that caused the disease, then the contrary will be considered to have been proved and the presumption is rebutted.

In practice, it appears that a much higher standard is generally set in order for the presumption to be rebutted. In fact, the presumption in Section 6(3) is often treated as if it was a conclusive presumption – ie: one that cannot be rebutted by contrary evidence. For example, the WCB has demonstrated a strong reluctance to find that the presumption has been rebutted when considering claims involving Item #4(e) on Schedule B – primary cancer of the lung. In several cases, a lengthy history of cigarette smoking by the worker had been identified to be the primary cause of the worker's lung cancer. Nevertheless, once it was found that the worker was employed in the process or industry described in Item #4(e), the WCB has generally disregarded the evidence of the smoking history and accepted the claim by applying the presumption in Section 6(3).

The majority of the Royal Commission acknowledged the concern that a higher onus was placed on employers than was required to meet the Section 6(3) presumption. The majority stated the following on pages 23 and 24 of its *Final Report*:

> Employers argue that in order to rebut the Section 6(3) presumption, adjudicators generally require proof on a balance of probabilities that the disease was caused by other non-work-related factors. In effect, this puts the onus on employers to prove causation.
>
> The commission agrees that it is not appropriate to impose such an onus of proof on employers, any more than it would be appropriate to impose the contrary onus on workers. Such an interpretation of the requirement for "proof to the contrary" is at odds with the usual approach to presumptions in other areas of law such as criminal and regulatory legal regimes. In those contexts, a presumption typically applies unless evidence is presented which raises a reasonable doubt as to whether the presumption is appropriate on the particular facts of the case. In the commission's opinion, this is the better approach. It can be accomplished by providing that the presumption will only apply in the absence of evidence putting causation in issue. Thus the presumption would not apply and there would be an adjudication on the merits where there is evidence to the contrary regarding causation, as opposed to evidence proving that the process or industry listed in Schedule B is not what caused the worker's disease.

As a result, the majority of the Royal Commission recommended that the concluding words "unless the contrary is proved" in Section 6(3) be replaced with "unless there is clear and convincing evidence to the contrary".

I am also of the opinion that the concluding words in Section 6(3) must be amended. However, the revision I intend to propose is based upon my earlier recommendation with respect to how occupational diseases should generally be compensated under the Act. As will be recalled, I have recommended that the Act should provide for the apportionment of compensation entitlement based upon the portion of the worker's disease which was causally related to occupational, as opposed to non-occupational, factors. It is my opinion that the application of Section 6(3) must similarly reflect this concept.

Under the apportionment approach, the first question which the adjudicator would need to determine is whether any occupational factors had causative significance with respect to the development of the worker's disease. In the case where Schedule B is applicable to that worker's disease, Section 6(3) would deem that the worker's employment did have causative significance, to some degree, with respect to the development of the worker's disease. Once Section 6(3) was found to be applicable, this presumption in favour of causative significance could not be rebutted. As such, the worker would be entitled to receive the minimum apportionment of 25% of whatever compensation benefits he/she was otherwise entitled to under the *Act*.

However, the adjudicator would still be required to determine whether non-occupational factors also had causative significance with respect to the development of the worker's disease. The presumption in Section 6(3) would not result in the application of the "all-or-nothing" standard of compensation entitlement discussed previously. Instead, the actual apportionment level applicable to a worker covered by Section 6(3) would once again depend on whether there were any non-occupational factors which were also found to have had causative significance in the development of the worker's disease.

Accordingly, I recommend the following:

(i) The concluding words "unless the contrary is proved" should be deleted from Section 6(3).

(ii) Once it is determined that Section 6(3) is applicable to a worker, he/she would be entitled to receive the minimum 25% apportionment of whatever compensation benefits he/she was otherwise entitled to under the *Act*. The actual apportionment level applicable to the worker would depend on whether there were any other non-occupational factors which were also found to have had causative significance in the development of the worker's disease.

4. Schedule B – The need for clear and consistent terminology

There are many Items listed in Schedule B which involve exposures to, or contact with, various substances identified in the second column. However, Schedule B uses a variety of words to describe the nature or extent of the exposure or contact required with respect to the particular process or industry.

For example, there are 22 instances where the description of process or industry set out in Schedule B merely refers to "exposure" to particular substances. There are 7 further instances where the reference is to "an exposure" (which would seem to infer the presumption would arise after a single exposure). Several other Items in Schedule B require an increased level of exposure, described in a variety of ways:

(i) prolonged exposure – used six times;

(ii) excessive exposure – used five times;

(iii) repeated exposure – used once; and

(iv) at least 1,000 hours of exposure – used once.

Similar usage of a variety of wording exists with respect to "contact". In particular:

(i) contact is used once;

(ii) close and frequent contact is used twice;

(iii) established contact is used once; and

(iv) prolonged contact is used once.

The rules of statutory interpretation would require adjudicators to conclude that the drafters of Schedule B intended the meaning of the term "exposure" or "contact" to differ under the various Items in Schedule B, depending on the phraseology used. Furthermore, the word "excessive" would appear to more aptly describe the sufficiency of the amount of exposure or contact, while "prolonged" is more focused on the passage of time. However, this distinction is not always supportable with respect to some diseases, such as cancer (where both the sufficiency and the length of time of the exposure may be relevant).

In my opinion, there is a need for consistent terminology to be used throughout Schedule B to describe what length of time, level or degree of exposure, or contact to a substance is required. The wording chosen must ultimately be readily understood by all of the adjudicative levels within the BC workers' compensation system.

I therefore recommend that the WCB review the terminology used throughout Schedule B to ensure there is a consistent description of what period of time and/or degree of exposure or contact is required in regard to a specified substance or process. Furthermore, if different terminology is used in Schedule B (such as "prolonged" and "excessive"), then the WCB should develop the appropriate published policy to provide a clear explanation of the meaning to be attributed to each term.

5. Who should have the authority to amend Schedule B?

Under the topic "Role Clarification/Definition" in my Terms of Reference, I was asked to address the following question:

> Should the authority to amend Schedule B of the *Act* (the presumptive schedule of occupational diseases) and to establish regulations of general application with respect to occupational diseases continue to reside with the WCB?

I will respond to this question in this part of the Report.

As noted on page 11 of the WCB's Briefing Paper, BC is the only jurisdiction in Canada where the authority to add, amend or remove items from a presumptive schedule of occupational diseases (such as Schedule B) resides with the WCB as opposed to with Government. The BC WCB's authority is set out in Section 6(4)(a) of the *Act*:

> The board may, on the terms and conditions and with the limitations the board deems adequate and proper, add to or delete from Schedule B a disease which the board deems to be an occupational disease, and may in like manner add to or delete from the said Schedule a process or industry.

The BC WCB is also provided the authority, pursuant to the definition of "occupational disease" in Section 1 of the *Act*, to designate or recognize a disease as an occupational disease by regulation of general application (or by order dealing with a specific case).

The Royal Commission felt that the authority to make determinations concerning Schedule B should rest with the WCB. After noting that all other Canadian jurisdictions confirmed such authority on the Cabinet or the Legislature, the Royal Commission stated the following (on page 20 of its *Final Report*):

> The commission agrees that the board's expertise, experience and access to expert research and relevant internal information make it an appropriate body to monitor, assess and update Schedule B designations.

However, in order to underscore the importance of this function, the Royal Commission also recommended that "supervision of such decisions by elected officials should be facilitated by requiring that proposed revisions to Schedule B be gazetted prior to implementation". I note that such gazetting does currently occur with respect to revisions made to Schedule B.

I agree with the Royal Commission's view, and therefore make the following two recommendations:

(i) The Board of Directors of the WCB should retain the authority to add, amend or delete items from Schedule B.

(ii) Any additions, amendments or deletions made to Schedule B by the Board of Directors must be gazetted prior to taking effect.

6. Schedule B – The need for ongoing review

As described previously, items are listed on Schedule B based upon the available medical and scientific evidence establishing that there is a substantially greater risk of the particular disease occurring in a particular employment than there is in the general population. However, medical and scientific knowledge has not, and will not, remain static. Accordingly, it is imperative that a comprehensive review of Items listed in Schedule B be conducted by the WCB on a regular basis in order to ensure that their continued inclusion remains relevant and appropriate based on the current medical/scientific knowledge as it exists at the time of the review.

I anticipate that the Policy Bureau of the WCB will have significant involvement in any review of the Items set out in Schedule B. However, I also envision that the Policy Bureau will have many competing priorities to address, particularly over the next several years as the WCB prepares for and implements the expected changes to the workers' compensation system. Accordingly, the time frame within which the ongoing review of any specified Item is to be performed must provide the WCB with the realistic opportunity to properly conduct the review.

I therefore recommend that the *Act* require the WCB to conduct a comprehensive review of each Item in Schedule B on a regular basis, and in any event at least once every 10 years.

Chapter 9: CHRONIC STRESS

A. Overview

Under the topic of "Occupational Diseases" in my Terms of Reference, I was asked to consider how the condition of "chronic stress" should be dealt with under the *Act*.

There are two matters of nomenclature I wish to address at the outset. **First**, I acknowledge that the reference, for workers' compensation purposes, to "chronic stress" or "workplace stress" is a misnomer. What is being dealt with under this heading are claims for psychological impairment caused by mental stimuli acting over time (ie: where no traumatic workplace incident has occurred). For the sake of convenience, I will be referring to this condition as "chronic stress" throughout this section.

Second, it is not clear to me whether chronic stress claims should be characterized as "personal injury" (for the purposes of Section 5 of the *Act*) or as an "occupational disease" (for the purposes of Section 6). There is no doubt that the published policies of the WCB treat claims for psychological impairment as personal injuries. Section #32.10 of the Claims Manual states the following:

> The Board does accept claims for personal injury where the injury consists of a psychological condition or the psychological condition is a consequence of a physical injury. However, the Board has not recognized any psychological or emotional conditions as occupational disease related to employment.

The recent Royal Commission considered the topic of "Stress or Psychological Injury Claims" in Volume II, Chapter 4 (entitled "The Scope of Compensation Coverage in British Columbia: Determining Work-Relatedness") on pages 34-44 of its *Final Report*. As noted by the Royal Commission on page 34, the definition of "occupational disease" in Section 1 of the *Act* is open-ended, and is broad enough to encompass diseases with non-physical symptoms and manifestations. After referring to Section #32.10 of the Claims Manual (as quoted above), the Royal Commission raised the following comments on page 36:

> ...the policy may result in undue fettering of discretion. The commission expresses no opinion as to whether any particular psychological or emotional conditions should be recognized as occupational diseases, but simply notes that in its view the Act does not prohibit such recognition and policy should not either.

For the purposes of this Report, I do not need to delve into the issue as to whether a psychological impairment should be characterized as a "personal injury" or an "occupational disease". Based upon what I believe to be unique characteristics associated with chronic stress, I have decided to consider it separately in this section of the Report.

Finally, there is one point I wish to emphasize at the outset of my discussion on this topic. In particular, the comments and recommendations I will be raising concerning chronic stress are not intended to apply to psychological impairments which are caused by a traumatic event, such as post-traumatic stress disorder. Such claims are currently accepted by the WCB as being compensable under the *Act*, and in my opinion the WCB should continue to adjudicate these claims pursuant to its existing policies.

B. Should Chronic Stress be covered under the *Act*?

Should compensation benefits be provided to a worker for psychological impairment caused by mental stimuli acting over time (ie: where no traumatic workplace incident has occurred)? The existing legislation does not contain any express provisions which are directly on point. Section 5 of the *Act* states that compensation is payable for any personal injury "arising out of and in the course of employment". Section 6 provides that compensation is payable where a worker suffers from an occupational disease which is "due to the nature" of his/her employment. Nowhere in the *Act* is a distinction drawn between an injury or disease caused by a physical stimulus as opposed to a mental stimulus, nor between an injury or disease caused by trauma as opposed to being caused by gradual onset where no traumatic incident has occurred.

The WCB's Claims Manual contains several policies which appear to be applicable to the compensability of chronic stress. However, when viewed as a whole, these policies are somewhat ambiguous – if not inconsistent. Nevertheless, as a general rule claims for psychological impairment, where no traumatic workplace incident has occurred, are denied by the initial WCB decision-makers as well as by the Review Board. On the other hand, the Appeal Division has, on occasion, accepted some of these claims based upon the particular circumstances in the case before it.

In my opinion, there are several reasons why chronic stress claims should be excluded from coverage under the *Act*. These reasons include:

(i) Everyone experiences stressful situations, in varying degrees, as part of their everyday life. Chronic stress, which results in a disabling impairment, generally arises from a myriad of interacting factors, some of which may be related to the worker's employment, but many of which arise from the worker's "private" life. As described by the Royal Commission on page 38 of its *Final Report*, stress is pervasive in everyone's life:

> In the commission's view, the most important feature distinguishing chronic stress claims from all other types of claims is the pervasive nature of stress in everyone's life. Unlike other forms of workplace hazards and conditions which might lead to injury or disease, stress is omnipresent. It acts on all workers in various contexts both inside and outside the workplace, often in ways which cannot be disentangled. While many multi-causal situations may present difficulties in adjudicating work-relatedness, chronic stress claims are uniquely challenging in that almost all claimants will have experienced stressors both related and unrelated to the workplace which may have played a causative role.

Once it is accepted that "stress is omnipresent" in everyone's life, it is difficult to understand why, or how, the worker's compensation system should be found responsible for providing compensation benefits for a claim arising from chronic stress.

(ii) There are many bona fide employment-related decisions which must be made by an employer which may cause a significantly stressful reaction by a particular worker. For example, the impending lay-off of an employee for economic reasons could certainly create a stressful situation for that worker. Similarly, an employee who is disciplined or terminated for just cause may suffer a stressful reaction, particularly if the worker believes the discipline was unjust or excessive.

Since such employment–related decisions are an inherent and unavoidable aspect of doing business, why should the workers' compensation system bear the costs in the event that the worker suffers a disabling stressful reaction?

(iii) Chronic stress claims are very subjective to each particular worker. As noted by the Royal Commission on page 38:

> Coupled with the pervasive nature of stress, several factors add further challenges to the area of chronic stress claims. For example, unlike most forms of physical injury, psychological injury is a highly subjective complaint and is not readily observable (at least to lay adjudicators and even many medical practitioners who do not specialize in psychology or psychiatry).

This "highly subjective" nature of stress claims may create issues of exaggeration or embellishment. Furthermore, it is often quite simple for a worker to obtain a medical note from his/her personal physician which states that the worker is unable to work due to stress associated with his/her employment. The physician's note is usually based solely on the subjective information provided by the worker.

(iv) It is my opinion that the potential acceptance of chronic stress claims will make the workers' compensation system in BC much more litigious, regardless of how often the final outcome may be for or against the compensability of such claims. Chronic stress claims are often premised on allegations by the worker of "fault" on the part of the employer's representatives. The employer's natural inclination in such cases is to oppose and refute the allegations.

Furthermore, the adjudication of such a claim will require close consideration of personal factors in the worker's life which may have contributed to the stressful condition. As noted on page 7 of the WCB's September 20, 2001 Briefing Paper entitled "Chronic Stress":

> Establishing causation in chronic stress claims may be complex. For example, the extent to which personal factors or non-work stressors may have contributed to the disability is a necessary consideration in

adjudication. This raises issues around credibility, relevance of evidence, the invasiveness of the inquiry, and disclosure to parties of very sensitive medical and personal information.

(v) There is a concern that the number of chronic stress claims will significantly increase if such claims become generally acceptable under the workers' compensation system in BC. In the face of such an increase, the potential cost implications to the system are substantial.

The Royal Commission recognized that this "floodgates" concern was a valid one, stating the following on page 37 of its *Final Report*:

> One of the major issues raised in connection with stress claims generally and particularly chronic stress claims, is the matter of cost and the concern that unrestricted entitlement to compensation for work-related stress will open the floodgates. Policy constraints on compensation for stress claims in British Columbia have unquestionably served to contain costs. Because they have always been in place, there is no direct information on what the effect would be in British Columbia if these constraints were reduced or eliminated altogether. The commission has received varying accounts of the experiences in other jurisdictions where such constraints were removed. Based on that information, it appears that the floodgates concern is a valid one.

The WCB's Briefing Paper noted that stress in the workplace is on the rise, particularly with respect to workers who were covered by health benefit plans at their workplaces. The following is stated on page 8:

> Stress in the workplace is on the rise. A study conducted by Ipsos-Reid found that "Canadians with employer-sponsored health benefit plans are experiencing significantly higher stress in the workplace than last year and that illness connected to that stress is on the rise." In 2001, 62% of respondents reported experiencing a "great deal of stress at work" compared with the 2000 survey which found that 47% reported the same. British Columbia benefit-plan workers were the most likely to complain of stress, with 69% complaining of workplace stress.
>
> This leads to concern about volume and costs, should coverage be expanded to include chronic stress.

In addition, several Canadian jurisdictions have amended their workers' compensation legislation to exclude stress claims, except when such a claim arises as an acute reaction to a traumatic event. For example, Sections 13(4) and (5) of the Ontario Workplace Safety and Insurance Act reads:

> (4) Except as provided in subsection (5), a worker is not entitled to benefits under the insurance plan for mental stress.

(5) A worker is entitled to benefits for mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment. However, the worker is not entitled to benefits for mental stress caused by his or her employer's decisions or actions relating to the worker's employment, include a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment.

In New Brunswick, the definition of "accident" in Section 1 of the Workers Compensation Act specifically excludes:

> ...the disablement of mental stress or a disablement caused by mental stress, other than as an acute reaction to a traumatic event.

Similar exclusionary provisions can be found in the workers' compensation legislation in Manitoba, Newfoundland, Nova Scotia and Prince Edward Island. This growing legislative pattern across Canada is, in my opinion, a clear indication of the political acceptance of the principle that compensation benefits should only be payable when the disabling condition can be directly related to the worker's employment.

Notwithstanding all of the above points, there are several reasons why claims for psychological impairment caused by mental stimuli acting over time should not be excluded from coverage under the Act. These reasons include:

(i) One of the fundamental purposes of workers' compensation legislation is to compensate workers for disabilities which are "truly work-caused". As stated by the Royal Commission on page 34 of its *Final Report*:

> The workers compensation system aims to compensate workers for "truly work-caused" injuries and disease. It is therefore the causal relationship between employment and the harm sustained by a worker which should determine entitlement to compensation, and not the nature of the harm itself.

In other words, if it can be established that the worker's disabling chronic stress was "truly work-caused", why should that worker's claim for compensation be automatically excluded from coverage under the Act? Although it is acknowledged that the adjudication of chronic stress claims may be fraught with difficulties, the degree of difficulty associated with the adjudication of any particular type of disability should not be the determinative factor as to whether or not compensation benefits will be provided under the Act.

(ii) As noted previously, several Canadian jurisdictions have specifically excluded stress claims from coverage under their workers' compensation legislation, except when such a claim arises as an acute reaction to a traumatic event. However, several concerns have arisen with respect to the prerequisite for the existence of a "traumatic event".

For example, the Ontario legislation contemplates the payment of compensation benefits for mental stress that is an acute reaction to a sudden and unexpected traumatic event. This limitation of a single traumatic event has led to concerns that otherwise compensable psychological conditions, that may arise as a result of a series of traumatic events, will be excluded from coverage.

For instance, police and firefighters in Ontario have raised concerns that they face a number of traumatic events in their work life, and that it is the cumulative effect of this series of traumatic events that may finally trigger the acute stress reaction. Another example involves claims for mental stress resulting from the cumulative effect of traumatic workplace harassment. As a result of these concerns, the Board of Directors of the Ontario Workplace Safety & Insurance Board have proposed amendments to its policies to recognize that each traumatic event in a series of events may affect a worker psychologically, even if the worker does not have the acute stress reaction until after the most recent event.

Once it is accepted that the prerequisite of a "traumatic event" includes a series of traumatic events, one may reasonably ask if there really is any significant difference between a psychological impairment that results from a series of traumatic events occurring over time and one that is caused by mental stimuli acting gradually over time. In other words, does the prerequisite of a "traumatic event" really act as an exclusionary factor in chronic stress claims?

A Panel of the Appeal Division has determined that the words "traumatically induced" should be given a broad interpretation. In Decision No. 00-0073 (2000), 17 WCR 129, the Panel was considering an appeal from a worker whose claim for compensation, based upon what the worker asserted was a major depressive disorder arising out of and in the course of employment, had been denied. One of the published policies in the Claims Manual which the Panel noted was applicable was Section #13.20, which reads in part:

> "Personal injury" includes psychological impairment as well as physical injury. A claim for traumatically induced psychological impairment could be accepted even if unaccompanied by any physical impairment.

One of the issues which the Panel had to determine was whether the "traumatically induced" requirement in Section #13.20 of the Claims Manual was in conflict with the entitlement provisions contained in the *Act*. The Panel determined that it did not need to resolve this issue due to the broad interpretation it gave to the meaning of "traumatically induced". In reaching its decision, the Panel stated the following:

> In our view the phrase "traumatically induced" does not limit compensation in cases of psychological disability in a manner inconsistent with the Act or policy, because it remains open to an adjudicator to interpret that phrase in a manner that allows a psychological disability to be treated in the same manner as a physical disability.

> The Act and policy regarding compensability of physical injury require that the injury arise out of and in the course of employment. There must be some connection between the injury and the employment. As we see it, that connection is, invariably, "trauma" of some type, if the word "trauma" is given a broad definition. ... However, it is in all cases necessary for some event or process to have occurred that caused, either immediately or over time, injury or disease. The application of a broad definition is consistent with the principle that workers' compensation legislation should be interpreted liberally with the goal of providing compensation for injuries that reasonably fall within its purview.
>
> In the case of policy item #13.20, an equally broad definition of "traumatically induced" can be applied in the context of psychological disorders. Thus, the phrase "traumatically induced" need not require a single specific incident. There can be a series of incidents that cause psychological trauma, either individually or cumulatively. However, there must be some "trauma" that arises out of and in the course of the worker's employment.

If I understand the above excerpt, as long as there is a connection between the worker's injury and his/her employment, the requirement for a "traumatic event" to have occurred will be met. In such circumstances, revising the BC legislation to exclude chronic stress claims, except where there is an acute reaction to a traumatic event, may not achieve the intended effect.

(iii) The following is stated on page 5 of the WCB's Briefing Paper:

> It is worth noting that excluding chronic stress claims from coverage under the workers' compensation system may lead to those claims being actionable in tort in certain circumstances.

Section 10 of the *Act* precludes a worker from bringing a legal action against his/her employer and/or a co-worker in respect of any personal injury, disablement or death arising out of and in the course of employment. In lieu of such right of action, a worker is entitled to the compensation benefits provided in Part 1 of the *Act*.

If chronic stress claims are excluded from coverage under the *Act*, it is certainly arguable that the worker would be entitled to sue his/her employer if the worker's chronic stress arose out of and in the course of his/her employment (since the worker would not otherwise be entitled to receive any compensation benefits under the *Act*). Such a legal action would significantly undermine one of the foundations of the "historic compromise" – that employers would be protected from legal actions brought by their workers as a result of work-related disabilities in exchange for employers collectively funding the workers' compensation system.

(iv) Finally, there is a question as to whether the exclusion of chronic stress claims from coverage under the *Act* would be lawful pursuant to the Canadian Charter of

> Rights and Freedoms. An argument could be raised that the exclusion from coverage of certain psychological impairments constituted discrimination under Section 15 of the Charter on the basis of "mental or physical disability".

Not surprisingly, representatives for labour and disabled workers assert that chronic stress claims should be dealt with under the *Act* in the same manner as any other physical or psychological disability that arises out of and in the course of employment; while representatives for employers seek an exclusion of chronic stress claims from coverage under the *Act*, except as an acute reaction to a traumatic event. I do not consider either of these alternatives to be the appropriate response to what the Royal Commission characterized as "uniquely challenging" claims.

I must admit that I am very attracted to the concept of excluding chronic stress claims from coverage under the *Act*, as has been done in several other Canadian jurisdictions. However, two factors compel me to seek an alternate resolution. **First**, my primary reason for wanting to exclude chronic stress claims lies in the inherent difficulties and adversarial nature I believe are associated with such claims. Nevertheless, as I have stated previously, I do not believe it would be appropriate to exclude any particular type of claim from coverage under the *Act* due to the anticipated degree of difficulty associated with the adjudication of that claim.

Second, and more importantly, to exclude all chronic stress claims would, in my opinion, be inconsistent with the purpose and intent of the fundamental principles which led to the establishment of the workers' compensation system, as reflected in the "historic compromise". If there was absolutely no doubt that a worker's claim for chronic stress arose out of and in the course of his/her employment, why should his/her claim for compensation benefits be automatically denied? I simply do not have a satisfactory response to this question.

Nevertheless, one cannot simply disregard the unique challenges and troubling features associated with chronic stress claims (as identified previously). Accordingly, in the next part of this section, I will identify several requirements which must be met before compensation benefits can be provided to a worker for a psychological impairment that was caused by mental stimuli.

C. When should Chronic Stress Claims be compensable?

In August 1999, the Appeal Division initially enunciated the "three-step test" for adjudicating claims for psychological impairment. The preliminary issue to be decided is whether the worker was suffering from a psychological impairment or injury. If answered in the affirmative, the "three-step test" would be applied in determining whether the worker's claim should be accepted under the *Act*. The application of the "three-step test" was recently described by the Appeal Division Panel in Decision No. 2001-0574 (2001), 17 WCR 347 at pages 352 and 353:

> The first question then in considering whether a worker has suffered a traumatically induced psychological impairment is whether the evidence supports a conclusion that the worker has suffered a psychological impairment or injury.

> Once the evidence establishes that some form of psychological impairment or injury exists, then consideration is given to whether this impairment was "traumatically induced" in order to determine whether it arose out of the employment. The following questions for assessing whether the psychological impairment was traumatically induced has been used in a number of Appeal Division decisions:
>
> > Did the workplace circumstances or events involve unusual stimuli?
> >
> > Were the workplace circumstances or events reasonably capable of causing psychological injury?
> >
> > If so, were the workplace circumstances or events of causative significance with respect to the worker's psychological condition for which compensation is sought?

The majority of the Royal Commission recommended that chronic stress claims which arise out of and in the course of employment should be covered under the *Act*. However, the majority was of the view that special restrictions should be placed on chronic stress claims "in light of the unique features of such claims". The majority of the Royal Commission accordingly made the following recommendation (on pages 41 and 42 of its *Final Report*):

> Non-physical conditions arising from non-physical and non-traumatic stimuli or stressors be compensable under the Workers Compensation Act under the following conditions:
>
> (a) the condition is medically recognized in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)*;
>
> (b) the condition is established by clear and convincing evidence to have arisen out of and in the course of employment;
>
> (c) the stressors leading to the psychological disability are objectively verifiable and are excessive or unusual in comparison with the stressors experienced by the average employee in that type of employment; and
>
> (d) the stressors leading to the psychological disability are not related solely to generic work processes, such as labour relations issues, disciplinary actions, demotions, layoffs, termination or transfer, when done in good faith and in a lawful and non-discriminatory manner.

My inclination on this issue is much closer to the "four-prong test" recommended by the majority of the Royal Commission than the "three-step test" developed by the Appeal Division. My reluctance to adopt the Appeal Division's standard emanates from the fact that the "three-step test" is based on the existing legislation – which does not specifically address psychological impairment arising from mental stimuli over time. Due to the troubling features of such claims, it is my opinion that the legislation must set out the express conditions which need to be met in order for a worker to be entitled to receive compensation benefits for chronic stress.

This is exactly what the recommendation of the majority of the Royal Commission proposed to do. With one exception (which I will discuss below), I generally accept the conditions recommended by the majority. I will now elaborate upon the conditions which I believe must be expressly set out in the legislation.

1. The need for an objective standard

As noted previously, chronic stress claims tend to be highly subjective to each particular worker. In order to offset this subjectivity, the legislation must require an objective assessment into the causation of the worker's alleged psychological impairment. On this point, I agree with the following comments raised by the Appeal Division Panel in Decision No. 00-0073, supra, at pages 142 and 143:

> We consider that there must be an objective assessment of causation in cases of alleged psychological injury, just as there are in cases of physical injuries. In physical injuries there is a determination of whether there was a work related activity or event that could have caused the worker's condition. A similar objective assessment must be carried out in cases of psychological injury. It is not usually sufficient to rely on the worker's belief that certain events have caused either a physical or psychological injury.
>
> Where psychological injury is alleged, an objective assessment is particularly important because a pre-existing or concurrent psychological condition may have an impact on the worker's perception of events in the workplace. In other words, the worker may perceive the workplace events as traumatic because of his or her psychological condition as opposed to the worker developing the condition as a result of the workplace events. If one accepts that the events were traumatic simply because the worker perceived them as traumatic, the nature of the workplace events becomes irrelevant. Such a result is inconsistent with the legislation which provides that compensation is limited to those situations where the employment is of causative significance with respect to an injury.
>
> It will be clear from the foregoing that the assessment necessary in cases of alleged compensable psychological injury cries out for an objective standard.

The majority of the Royal Commission responded to this "subjectivity" concern by recommending that chronic stress claims be compensable only where the condition in question is a medically accepted one and is diagnosed by reference to a widely acknowledged resource such as the American Psychiatric Association's "Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition" (as revised from time to time). I am in agreement that such a requirement should be specified in the legislation. However, I do not believe that the legislation should specifically refer to the American Psychiatric Association's publication, since there may well be other available "widely acknowledged resources".

There is one further comment I wish to raise concerning the requirement that the worker's psychological condition be medically recognized. In my opinion, in most cases this would necessitate a diagnosis rendered by a specialist with respect to psychological impairments who is best able to render a medical opinion and diagnosis after fully evaluating the worker's condition – ie: a psychiatrist or psychologist. Although I am not recommending that the *Act* specifically require the involvement of a psychiatrist or psychologist, I do believe that adjudicators within the workers' compensation system should be wary when a personal physician, who may not have sufficient expertise or experience in psychological conditions, renders an opinion based upon the subjective information presented by the worker.

2. The need to exclude bona fide employment–related stressors

There are two aspects of this issue which must be recognized in the requirements set out in the legislation:

(i) that every type of employment has some degree of stress associated with it, and

(ii) that there are many bona fide employment-related decisions which must be made by an employer which may cause a stressful reaction by a particular worker.

The first aspect – that every type of employment has some degree of stress associated with it – led both the Appeal Division and the majority of the Royal Commission to adopt the standard that the targeted stressors or mental stimuli be "unusual" or "excessive". The Appeal Division elaborated upon why it adopted the "unusual stimuli" standard in Decision No. 00-0073, supra, at page 142:

> The workplace has always involved complex interpersonal relationships, and it is human nature that interpersonal relationships can create psychological distress. There is not a working person among us who has not, on occasion, gone home from work feeling some negative emotion flowing from events at work. For this reason, we cannot accept that any workplace event or series of events that the worker perceives as a negative emotional experience can fall within the meaning of the phrase "traumatic event". The event or series of events must be of significantly greater dimensions that the day-to-day tensions that arise in the workplace.

The majority of the Royal Commission commented upon both aspects of this issue on page 39 of its *Final Report*:

> Further, stress is a part of every workplace which is not necessarily undesirable (unlike most types of workplace hazards), and may be associated with necessary and unavoidable aspects of doing business (such as, for example, discipline or termination of employees). Employers cannot be called upon to eliminate all forms of stress from the workplace, as this would be neither possible nor desirable. However, the system should encourage employers to eliminate

> *unusual, excessive or unlawful* stressors and should compensate workers who suffer recognized disability as a result of the latter, just as it currently compensates those injured as a result of traumatic stressors. The commission therefore considers it appropriate to restrict chronic stress claims to circumstances involving stressors which are excessive or unusual and which are unrelated to generic work processes such as disciplinary actions, transfers, layoffs and labour relation issues undertaken lawfully and in good faith.
>
> With respect to the unusual or excessive nature of the workplace stressors in issue, the commission considered various alternatives whereby such stressors might be assessed by comparison to those experienced in everyday life, those experienced by the average worker in any type of employment and those experienced by the average worker in the same type of employment as the claimant. The commission concluded that the latter provides the best basis for comparison in assessing whether stressors are unusual or excessive. Otherwise, all workers employed in high stress occupations such as policing, air traffic control or emergency medical aid would meet the threshold. The commission is concerned that this might open the floodgates to claims from those who do this type of work and might also eliminate a disincentive for those who are constitutionally ill-suited to high stress work from undertaking such forms of employment.

Based on the above reasoning, the majority of the Royal Commission recommended that the stressors leading to the worker's psychological impairment:

(a) must be objectively verifiable and are excessive or unusual in comparison with the stressors experienced by the average employee in that type of employment, and

(b) must not be related solely to generic work processes, such as labour relations issues, disciplinary actions, demotions, layoffs, termination or transfer, when done in good faith and in a lawful and non-discriminatory manner.

I am in agreement with the above recommendations, and accordingly I recommend that similar concepts be included within the legislation.

3. The need to account for the pervasive nature of stress

To reiterate the comment raised by the Royal Commission on page 38 of its *Final Report*:

> In the commission's view, the most important feature distinguishing chronic stress claims from all other types of claims is the pervasive nature of stress in everyone's life.

In my opinion, this "most important distinguishing feature" must be specifically taken into account when establishing the standard upon which chronic stress claims are to be adjudicated within the workers' compensation system.

The majority of the Royal Commission concluded that the same onus of proof should apply to the adjudication of chronic stress claims as is used in the adjudication of other claims – ie: the onus of proof is based on whether the worker's employment was of "causative significance" in the development of the worker's injury or illness. (As discussed in the previous section of this Report (entitled "Occupational Diseases"), the test of causative significance will be met once it is determined that the worker's employment played more than a trivial or insignificant role in the development of his/her injury or illness.) However, the majority of the Royal Commission believed that a higher standard of evidentiary proof was required in the adjudication of chronic stress claims as opposed to other types of claims. In reaching these conclusions, the majority of the Royal Commission stated the following on page 40:

> The commission has therefore concluded that the usual causal significance test should be retained with respect to chronic stress claims. There is nothing unique or specific to such claims, apart from cost containment concerns, which justifies subjecting them to a higher threshold of workplace causation than applies with respect to other types of claims. In the commission's opinion, the cost containment concerns can be addressed by the other measures discussed above and the introduction of a higher standard of proof that work-related factors are of causal significance.
>
> The commission is of the view that in the case of the applicable standard of proof, distinctions *can* be made between chronic stress claims and other types of claims on a principled basis. Applying the current standard of "as likely as not" to the causal significance onus is apt in the commission's view to lead to an unacceptable flood of claims and the potential for widespread compensation for conditions which meet the current low standard of proof but have actually resulted from non-work related stressors. Increasing the level of certainty which an adjudicator must have regarding the causal significance of work-related stressors is warranted in light of the uniquely pervasive nature of stress in and out of the workplace, and the subjective nature of reactions to stressors.

The higher standard of evidentiary proof adopted by the majority of the Royal Commission was the standard of "clear and convincing evidence". The majority described this standard on page 41 as one "which is substantially higher than the 50% balance of probabilities, but does not go so far as requiring proof beyond a reasonable doubt".

I do not believe the higher standard of evidentiary proof (ie: of "clear and convincing evidence") sufficiently accounts for the pervasive and subjective nature of stress. Although the adjudicator would need to have a higher level of certainty when weighing the evidence, the threshold to receive compensation benefits would still be based upon the very low test of causative significance. In other words, if employment-related stressors played more than a trivial or insignificant role in the development of the worker's chronic stress, then he/she would be entitled to receive full compensation benefits under the Act, regardless of the degree of causative significance of non-work related stressors.

I had addressed this same low threshold concern (associated with the concept of "causative significance") with respect to the adjudication of occupational diseases by proposing an apportionment standard (whereby the worker's entitlement to compensation benefits would be apportioned between those occupational and non-occupational factors which were found to have had "causative significance" in the development of the worker's disease). However, due to the distinguishing features of chronic stress claims from other types of claims (in particular, the pervasive nature of stress and the high degree of subjectiveness associated with such claims), I do not believe it would be appropriate to similarly adopt an apportionment approach to the adjudication of chronic stress claims.

In my opinion, the "predominant cause" approach should be adopted as the standard for adjudicating chronic stress claims. Pursuant to this standard, compensation benefits would be payable to the worker when the employment-related stressors are found to represent, on a balance of probabilities, more than 50% causal significance leading to his/her psychological impairment. If the employment-related stressors did exceed 50% causal significance, then the worker would receive full entitlement to compensation benefits provided under the Act (ie: there would be no apportionment of the worker's entitlement). However, if the employment-related stressors did not reach this "predominant" level, then the worker's claim for chronic stress would not be accepted as being compensable under the Act.

The majority of the Royal Commission considered, and rejected, the adoption of the "predominant cause" test. After noting that such a standard had been adopted in other jurisdictions, the majority stated the following (on page 40 of its *Final Report*):

> It appears to the commission that the predominant cause test poses the more difficult hurdle and would result in the allowance of fewer chronic stress claims than the introduction of a higher standard of proof. Be that as it may, for the same reasons as those discussed earlier in this report in relation to general issues relating to proof of causation, the commission does not consider the predominant cause test appropriate in the case of chronic stress claims. In a great many, if not most cases, there is simply no reasonable scientific method of allocating degrees of causation between work-related and non-work-related factors, and that is true whether one is considering physical or non-physical causes and effects. The result would therefore be either an arbitrary allocation of degrees of causation or a denial of most chronic stress claims on the basis that the predominant cause simply cannot be determined. Neither result can be justified on the basis of principles underlying the Act.

In my opinion, the adoption of the "predominant cause" approach can be reasonably supported with respect to the adjudication of chronic stress claims. I base my opinion on the following comments:

(i) As noted previously, one of the fundamental purposes of workers' compensation legislation is to compensate workers for disabilities which are "truly work-caused". I agree with the Royal Commission's characterization that chronic stress claims have important distinguishing features from all other types of claims. These unique features (in particular, the inherent uncertainties surrounding the causal factors which led to the worker's psychological impairment, and the subjectiveness of the worker's claim) readily justify the different, and higher, standard of predominance.

(ii) Once the worker's claim for chronic stress is accepted, he/she would be entitled to receive full compensation benefits provided under the Act. If it is decided that, notwithstanding the pervasiveness of stress in everyone's life, the costs associated with chronic stress claims are to be borne by the workers' compensation system, we must do so with full confidence that the worker's disability is a workplace responsibility. In my opinion, any lesser standard of causality (than the "predominant cause" approach) would not suffice to justify such confidence.

(iii) I do not doubt that the "predominant cause" approach will create difficulties in adjudication However, I reiterate my previous response to this concern – the entitlement to compensation benefits under the Act should not be granted (or denied) on the basis of what is the administratively easiest thing to do.

(iv) For the reasons I previously discussed in the "Occupational Diseases" section of this Report, I do not share the Royal Commission's concern that adjudicators will be unable to allocate degrees of causation between work-related and non-work-related factors. The determination as to whether the predominant cause standard has been met will be based on the evidence presented to, or obtained by, the adjudicator. The fact that the predominant cause approach may involve a greater degree of difficulty than other decisions does not mean such a decision cannot be effectively made.

Chapter 10: PENSIONS

A. Overview

Permanent disability (or pension) awards are payable under the Act when an occupational injury or disease causes the worker to suffer a permanent (partial or total) residual disability. A permanent disability award is assessed and becomes payable when the WCB determines that the worker's temporary impairment from the occupational injury or disease has stabilized.

The WCB currently uses two methods to calculate the worker's entitlement to a permanent disability award – the loss of function (or physical impairment) method, and the projected loss of earnings method. Pursuant to its published policies, the WCB assesses the pension entitlement of a permanently disabled worker using the two methods of calculation in every case where applicable. The worker will receive the higher amount calculated pursuant to the loss of function and the projected loss of earnings methods.

The Royal Commission considered the topic of "Compensation for Permanent Disability" in Volume II, Chapter 1 (entitled "The Adequacy of Benefits") of its *Final Report*, on pages 13 to 24. I will be referring to the Royal Commission's discussion throughout this section. I will also be referring to the WCB's September 24, 2001 Briefing Paper entitled "Permanent Partial Disability Pensions".

1. Loss of Function Method

The use of the loss of function method of calculating the worker's entitlement to a pension award is mandatory pursuant to Section 23(1) of the Act. The Royal Commission described the loss of function method on page 15:

> The first method, prescribed in Section 23(1), requires that the impairment of earning capacity be estimated from the "nature and degree of the injury." The estimated loss of earnings resulting from the estimated impairment is then directed to be paid for the lifetime of the worker or in another manner the board determines. Section 23(2) permits the use of a rating chart to guide how much impairment of earning capacity, stated as a percentage of total disability, is associated with a specific injury or mutilation. In practice the board makes extensive use of this rating chart in granting pensions, also known as functional or functional impairment pensions, under Section 23(1).

As noted above, the functional method estimates the worker's impairment of earning capacity from the "nature and degree of the injury". In determining the worker's impairment of earning capacity for the purposes of Section 23(1), the WCB makes extensive use of its Permanent Disability Evaluation Schedule (the "PDES"), which sets out the percentages of impairment to be assigned to numerous specified disabilities. The intent is that the same percentage rate of impairment is to be applied to all workers who suffer a similar work-related disability. In other words, the pension award under the loss of function method is intended to cover the presumed average impairment of earning capacity suffered by the average worker arising from the same type of disability.

2. Loss of Earnings Method

The loss of earnings method of calculating the worker's pension award is contemplated in Section 23(3) of the *Act*. The use of this method is discretionary, as Section 23(3) permits the WCB to utilize this method "where the board considers it more equitable". The Royal Commission described the loss of earnings method on page 15:

> The second method, known as the loss of earnings method, is prescribed in Section 23(3) and is directed to be used where "the board considers it more equitable." The board has interpreted this to mean that the latter method should be employed where it would result in higher benefits. Rather than measuring loss of earning capacity by reference to degree of functional impairment as under Section 23(1), this section instead requires payment of the difference between the worker's average earnings before the injury and what the worker earns or is able to earn in some suitable occupation after the injury. The duration of this loss-of-earnings award is not specified in the subsection.

Section 23(3) permits the WCB to calculate the worker's pension award based upon his/her particular loss of earnings. The pension award is intended to reflect the worker's projected loss of earnings over the long term.

As noted by the Royal Commission, the *Act* does not specify the duration of the payment by the WCB of loss of earnings pension awards. Accordingly, the question of duration has been dealt with by the WCB in its published policies set out in Section #40.20 of the Claims Manual. The WCB's Briefing Paper summarized the WCB's policies on page 17:

> Under the *Act*, awards calculated under the functional method are generally payable for life. The *Act* does not specifically stipulate the duration of LOE pensions. By policy, the Board considers age 65 to be the standard retirement age, and generally converts a worker's pension to a functional award. However, there are three circumstances in policy where LOE pensions continue in whole or in part after age 65:
>
> - When a worker is able to demonstrate that he or she would have worked past age 65 had the injury not occurred. In these cases the LOE pension will continue until the worker reaches retirement age.
> - When a worker is at or below age 50 on the date of injury. A pension will be established in these cases based on the dual system and the pension once established is payable for life.
> - When workers are injured in the age range of 51 and 64 years and are entitled to an LOE pension. At age 65, the pension is calculated using the functional method plus a proportion of the difference between the two

> methods. The policy assumes that an older worker's ability to save for retirement is less affected by a disability than that of a younger worker.

The *Act* also does not specify whether a loss of earnings award, once established, must be subject to a subsequent review by the WCB. Once again, this is a matter which the WCB has addressed by way of policy (set out in Section #40.30 of the Claims Manual). The WCB Briefing Paper described this loss of earnings pension review policy on page 7:

> Once the LOE pension is established, Board policy provides that there should be an automatic review of the award at two years from the date of assessment or, if there is an appeal, two years from the date of the last decision resulting from the appeal process. Following that review, there will be no further automatic reviews, but the Board officer has the discretion to set up a claim for reviews at future dates which he or she determines. By policy, neither a worker nor an employer can apply for a review of an LOE pension at any time unless there has been a change in the claimant's physical condition.

If, at the time of the loss of earnings pension review, the worker's earnings or projected earnings are within 5% (above or below) the earnings which were previously projected by the WCB, no change will be made to the existing loss of earnings pension.

3. Application of the "Dual System" of measuring permanent disability

Prior to 1973, the WCB used only the loss of function method to calculate a permanently disabled worker's pension award. The WCB first began to use the loss of earnings method in 1973, but only for injuries involving the spinal column.

In October 1977, the former Commissioners of the WCB raised the question as to whether it would be appropriate to extend the application of the loss of earnings method to non-spinal column injuries. As a result, a Committee was established to determine whether, in the case of an injury unrelated to the spinal column, a loss of earnings pension award would be more equitable. From October 1, 1977 to January 31, 1979, the Committee reviewed 4,180 permanent partial disability awards which were not related to the spinal column, and determined that 7 of those awards should be calculated using the loss of earnings method. This review led the Commissioners to the following conclusion (in Decision No. 297 (1979), 5 WCR 11):

> In the case of non-spinal injuries, the evidence overwhelmingly supports the conclusion that awards based upon the functional impairment method, with the use of the *Disability Awards Evaluation Schedule* as a guide, adequately represent the likely future loss of earnings of the worker.

Nevertheless, the Commissioners concluded (on page 12) that the loss of earnings method should be used in a "few exceptional cases" involving non-spinal injuries:

> We are satisfied that that system (ie: the loss of function method) operates to the advantage of claimants and the vast majority of cases should be dealt with on

> that basis. Nevertheless, the exercise has pointed out those few exceptional cases where, in spite of the effectiveness of the percentages set out in the Schedule, some workers will lose earnings in the future in excess of the amounts yielded by application of the Schedule. We feel that Disability Awards Officers, and the Disability Awards Committee, should have the power in such exceptional cases to investigate, consider, and where appropriate, implement a pension based on the potential loss of earnings of the worker.

The use by the WCB of these two methods of calculating pension awards has been referred to as the "Dual System". The application of the Dual System was described by the former Commissioners in Decision No. 394 (1985), 6 WCR 23 on page 24:

> The dual system applies in any case where it is felt that the worker may have suffered a loss of earnings because of his compensable disability which is greater than that allowed for by the physical impairment method of assessment. Under the dual system, awards are calculated as follows:
>
> 1. The degree of physical impairment is calculated pursuant to Section 23(1) using the method described above and a possible pension is calculated in accordance with this.
>
> 2. A possible pension is calculated pursuant to Section 23(3) according to the projected loss of earnings method described below.
>
> 3. The higher of these two results is then used as the pension.

Accordingly, the method used by the WCB in determining pension awards for workers who suffered permanent disabilities has evolved from:

(i) utilization of the loss of function method only,

(ii) to the additional consideration of the loss of earnings method, but only for injuries related to the spinal column,

(iii) to the additional consideration of the loss of earnings for all permanent injuries, with the express expectation that the loss of earnings method should be used in only a "few exceptional cases" involving non-spinal injuries,

(iv) to the mandatory consideration of both methods in every case where a pension award is being assessed, with the higher of the two calculations being used as the basis for the worker's pension.

The WCB Briefing Paper described (on page 5) the increases which have occurred in the last 10 years with respect to the number of loss of earnings awards granted by the WCB, and to the pension reserves required by the WCB to fund the present and future costs of these awards:

> . . ., the total permanent partial disability award reserve (functional and LOE pensions) rose from $162.8 million in 1990 to $349.2 million in 2000. The

number of permanent partial disability awards, however, has not experienced similar growth. The total number of pension awards grew slightly from 4,708 in 1990 to 4,798 in 2000.

The growth in total pension reserves (functional and LOE) was due primarily to an increase in the number of LOE awards and an associated increase in pension reserves. In 1990, LOE pensions accounted for approximately 10% of total pension awards and 44% of pension reserves. The total number of LOE pensions in 2000 was 802, or 17% of all awards. The corresponding total reserve for loss of earnings pensions was $216.3 million or 62% of total pension reserves. Conversely, while functional awards accounted for 83% of total awards last year, its share of pension reserves was only 38%, or $133 million. The lower pension reserve for functional awards is a reflection of the large number of functional awards granted by the Board for relatively low dollar amounts.

The overall growth in LOE pensions was due in large part to an increase in the number of 100% LOE awards, which are granted when it is determined that the worker is unemployable due to his or her compensable disability. For example, in 1990 the number of 100% awards accounted for approximately 17% of all LOE awards. By 2000, this percentage had risen to over 36%.

B. Concerns arising from the application of the "Dual System"

The WCB Briefing Paper enunciated the following concern on page 4:

> The growth in the number of pension awards, but more strikingly the growth of the pension reserve for both LOE and functional awards, is of particular concern for the long-term viability of the system.

In my opinion, there are two aspects of the Dual System which significantly contribute to the concern raised by the WCB with respect to the long-term viability of the system:

(i) the mandatory consideration of both the loss of function and the loss of earnings methods, and the payment of the higher amount, in every pension award assessment, and

(ii) the payment of the loss of function pension and, in varying degrees depending on the age of the worker on the date of his/her injury, the loss of earnings pension for the lifetime of the worker.

In the next two parts of this section, I will be elaborating upon each of these aspects of the Dual System.

C. The Mandatory Consideration of both the Loss of Function and the Loss of Earnings Methods

The loss of function and the loss of earnings methods of calculating a permanently disabled worker's entitlement to a pension award are built upon fundamentally different principles. Pursuant to the loss of function method, every worker who suffers the same type of disability is presumed to have incurred the same level of impairment of earning capacity. In other words, the average impairment of earning capacity is attributed to each permanently disabled worker based upon the "nature and degree of the injury".

The loss of function method does not take into account the actual impact which the disability may have on each worker's earning capacity based upon his/her individual circumstances. Instead, it provides the same percentage of compensation for the impact which the disability may reasonably be expected to have on the worker's earning capacity in the future. For example, the loss of function method is intended to provide compensation to the worker for the potential that he/she may experience, as a result of the permanent disability,

- short-term fluctuations in his/her compensable condition;
- reduced prospects of promotion;
- restrictions in future employment; and/or
- a reduced capacity to compete in the labour market.

As a result of providing the same percentage of compensation entitlement to all workers who suffer a similar permanent disability, most workers are either undercompensated or overcompensated by the loss of function method when one considers their actual loss of earnings arising from the disability. For example, a worker who suffers a permanent injury, which will preclude the worker from returning to his/her previous employment, may well have an actual loss of earnings which is greater than the amount of the functional award provided to him/her. In such circumstances, the worker would be undercompensated by the application of the loss of function method.

On the other hand, a worker may suffer an injury, which results in the amputation of part of his/her leg, but is able to return to his/her pre-injury employment. In these circumstances, the worker would receive a pension award which is greater than his/her actual loss of earnings, and would accordingly be overcompensated by the loss of function method.

The primary advantage of the loss of function method is that it is administratively efficient to apply. The WCB is not required to readjudicate the worker's entitlement whenever there is a fluctuation in his/her employment situation, since the impact of the worker's disability on his/her earning capacity as a result of the fluctuation had already been contemplated in the initial pension award. The obvious disadvantage is that the loss of function award is based on the nature and degree of the disability, which may have no relationship to the actual loss suffered by the worker.

Turning to the loss of earnings method, its purpose is to compensate the worker for the loss of earning capacity incurred by the worker as a result of his/her permanent disability. Under this method, the worker will receive compensation based on the difference between what he/she was earning before the injury and what he/she is earning, or is able to earn, after the injury. If the worker is able to return to work without any loss of earnings, no pension award will be granted solely on the basis that the worker suffered a permanent disability. (Section 23(3) of the *Act* is applied by the WCB on a "projected loss of earnings" basis – whereby the WCB determines the loss of earning capacity based upon suitable occupations that the worker could reasonably be expected to undertake over the long-term – as opposed to on an "actual loss of earnings" basis, which is more focused on the worker's immediate loss.)

The advantage of the loss of earnings method is that it provides the worker with a pension award based upon his/her own particular circumstances. If properly applied, the loss of earnings method should compensate the worker for his/her loss of earning capacity – ie: the pension award granted to the worker should not result in his/her being undercompensated or overcompensated. The primary disadvantage of the loss of earnings method is that it involves a great deal of discretion. The WCB's Briefing Paper described (on page 10) the difficulties associated with the projected loss of earnings method adopted by the WCB pursuant to Section 23(3) of the *Act*:

> The projected LOE method involves the exercise of a great deal of discretion. Various subjective considerations make this method complex to administer and contentious. Decisions with respect to the individual worker's suitability for available jobs; occupations the worker could be expected to undertake; the earnings in those occupations; and the impact of other factors which might affect a worker's future earnings capacity, underscore this complexity and result in appeals.

As stated at the outset, I believe that the loss of function and the loss of earnings methods are built upon fundamentally different principles. The adoption of one or the other method involves a balancing of competing factors. However, in BC the WCB has blended the application of these methods into one by requiring the "Dual System" to be applied in every case where a pension award is being assessed. I have two primary concerns arising from the WCB's policy that the Dual System must be applied in every case, and that the higher of the two calculations is then used as the basis of the worker's pension award:

(i) As noted previously, the application of the loss of function method results in a presumed impairment of earning capacity being attributed to each worker who suffers a similar permanent disability. As a result, most workers are either undercompensated or overcompensated (vis-à-vis their actual loss of earnings capacity) through the use of the loss of function method.

The mandatory application of the loss of earnings method, in addition to the loss of function method, should substantially rectify the undercompensation which results for those workers who suffer a greater loss of earnings capacity than is provided for under the loss of function method. However, the potential for overcompensation by the loss of function method will still remain. In other words, the collective balance achieved by applying the loss of function method (that some workers will be undercompensated and some will be overcompensated) is distorted by the mandatory application of the loss of earnings method in each case (in that some overcompensation will still occur when the functional award is the higher of the two pension calculations).

(ii) Those workers who are, in effect, overcompensated by the loss of function method (vis-à-vis their actual loss of earning capacity arising from their permanent disability) are arguably receiving an award from the WCB which may appear to compensate the worker for his/her non-economic loss associated with the injury (such as for pain and suffering, and for loss of amenities of life). I have two concerns which arise from this "appearance" of providing a non-economic loss benefit in these circumstances.

First, the provision of a non-economic loss benefit is not currently contemplated by Section 23 of the *Act*. To the contrary, any payment of a pension award pursuant to Section 23 is intended to be focused on the impairment of the worker's earning capacity arising from the permanent disability.

Second, only a portion of permanently disabled workers would be receiving what may appear to be compensation for their non-economic loss arising from their injuries. The remainder would only be receiving, through the application of the Dual System, the equivalent of their loss of earning capacity associated with their permanent disabilities.

The majority of the Royal Commission raised similar concerns with the Dual System of calculating pension awards in BC. The following was stated on page 21 of the *Final Report:*

> A fundamental question must be answered: What losses arising out of workplace injuries should be compensated in a no-fault scheme? Historically, the system has focused on compensation for loss of ability to earn income and has generally ignored purely non-economic losses such as pain and suffering, loss of enjoyment of life and related losses. The methods of assessing benefits for temporary disability and for permanent total disability, as well as the loss-of-earnings method of assessing permanent partial disability pensions, focus on economic losses and exclude compensation for other types of loss. The functional impairment approach is out of step with all of the foregoing to the extent that it allows for compensation greatly in excess of, or in the total absence of, actual economic loss.
>
> If functional impairment benefits, as is often suggested, serve to compensate workers for non-economic losses, then such benefits should also be available to other similarly situated workers, ie: those with permanent total disabilities and those with permanent partial disabilities whose pensions have been calculated by reference to the loss-of-earnings method.

> The commission believes that the primary focus of compensation for permanent disability should remain on restoration of and compensation for the workers' lost earning capacity, whether that arises from work-related injury or from occupational disease. Provisions in the Act pertaining to economic-loss benefits should focus on this and actual loss of earnings or earning capacity should be a prerequisite to such benefits, whether the wage loss arises from injury or occupational disease.

Based upon the above comments, the majority of the Royal Commission made the following recommendations:

(i) The loss of function method of calculating a permanently disabled worker's entitlement to a pension award, pursuant to Section 23(1) of the *Act*, should be discontinued.

(ii) Pension awards granted to permanently disabled workers should only be based upon the worker's actual loss of earnings capacity (ie: the difference between the worker's net average earnings before the injury and the net average amount which the worker is earning or is able to earn in some suitable occupation after the injury).

(iii) All permanently disabled workers should receive a lump sum payment for "non-economic loss" associated with the permanent disability, in addition to any pension award the worker may be entitled to receive as a result of his/her actual loss of earning capacity.

Most Canadian jurisdictions provide compensation benefits for a permanent disability on a basis similar to that recommended by the majority of the Royal Commission – a pension award is granted to a permanently disabled worker only to compensate for his/her actual loss of earning capacity arising from the disability, and an additional specified amount is provided to compensate the worker for his/her non-economic loss arising from the permanent impairment. In other words, in most of the other Canadian jurisdictions pension awards for a worker's loss of earning capacity are not based upon the nature and degree of the injury (as is currently required in BC pursuant to Section 23(1) of the *Act*).

I must admit that I initially was, and still am, very attracted to the method recommended by the majority of the Royal Commission in regard to how workers who suffer a permanent disability should be compensated. I fully concur with the majority's belief "that the primary focus of compensation for permanent disability should remain on restoration and compensation for the workers' lost earning capacity". Furthermore, the majority's recommendations address both of the concerns I had previously raised with respect to the mandatory application of the Dual System:

(i) The discontinuance of the loss of function method, and the adoption of the actual loss of earnings method, removes the elements of undercompensation and overcompensation which are inherent in the loss of function method.

(ii) Providing a specified non-economic loss benefit to all permanently disabled workers treats all such workers in a similar manner.

Nevertheless, I have one significant concern with the adoption of the "actual loss of earnings" method. Pursuant to this method, a permanently disabled worker would not receive any compensation unless he/she suffers a loss of earning capacity as a result of the impairment (ie: no compensation would be provided for the worker's "presumed" loss of earning capacity, as is currently the case under Section 23(1) of the *Act*). If such a system is adopted, it is my opinion that the worker must be entitled to return to the WCB for further consideration for compensation payments whenever a change of circumstance occurs in his/her employment status which results in the worker incurring an actual loss of earnings which exceeds a trivial or insignificant amount. In other words, the worker should be entitled to receive compensation benefits in the event that he/she suffers either a temporary or permanent loss of earnings in the future as a result of the compensable disability.

The WCB Briefing Paper identified this concern on page 11:

> There are, however, a number of challenges with the actual LOE method. The main challenge pertains to the determination of whether a worker's disablement is a consequence of a compensable injury or disease, or a consequence of other causes, pre-existing, concurrent or subsequent. Under the actual method, this determination is subject to constant or periodic review and it becomes more difficult as the consequences of the compensable disability blend with subsequent events affecting the health of the worker.

The focus of my concern is on the administrative impact which the adoption of the actual loss of earnings method will have on the WCB. In particular, I perceive a lack of any adjudicative finality with respect to a claim which involves a worker who has suffered a compensable permanent disability. A worker would be entitled to seek additional compensation payments from the WCB anytime that the worker believes he/she has suffered an actual loss of earnings as a result of his/her permanent disability, and each decision rendered by the WCB in such circumstances would be subject to an appeal by an affected party.

The following examples illustrate the concern I have with respect to the adoption of the actual loss of earnings method:

(i) I return to the case of a worker who suffers an injury which results in the amputation of part of his/her leg, but who is able to return to his/her pre-injury employment. In such circumstances, the worker would receive wage loss compensation payments from the WCB, pursuant to the actual loss of earnings method, until the worker is able to return to work. Thereafter, no further compensation payments would be provided, since the worker would no longer have any actual loss of earnings.

However, assume the worker has temporary fluctuations in his/her compensable condition which causes him/her to miss one or two days of work on an irregular basis. During such absences, the worker would be suffering an actual loss of earnings, and should therefore be entitled to seek further compensation payments from the WCB to offset his/her temporary loss. This entitlement to return to the WCB would arise from the fact that the worker would not have received a "loss of function" award which is intended to fully compensate the worker for such temporary fluctuations.

(I recognize that, in the event the majority of the Royal Commission's recommendations are accepted, the worker would have received a "non economic loss" payment from the WCB arising from his/her compensable permanent impairment. However, in my opinion this payment should not be taken into account in determining whether the worker has any further entitlement for loss of earnings compensation arising from temporary fluctuations in his/her condition. My reasoning on this point is quite straight-forward – the payment of the recommended "non-economic loss" benefit is intended to compensate the worker for pain and suffering and for loss of amenities of life, and not for any loss of earnings he/she may have in the future arising from the permanent disability.)

(ii) Assume the worker, referred to in point (i) above, is denied a promotion to a position with the employer which would pay substantially more money to the worker, and that the worker attributes the denial of the promotion primarily to his/her compensable disability. Once again, the worker would be entitled to have his/her assertion adjudicated by the WCB and, if the compensable disability was found to have been a significant factor in the employer's decision, to receive the appropriate compensation for the worker's actual loss of earning capacity.

(iii) Assume the same worker is temporarily laid off by the employer for a period of one month. During that period the worker is unable to find alternate short-term employment, which he/she attributes to the compensable disability. Once again, this issue would have to be adjudicated by the WCB.

(iv) Finally, assume the same worker's employment is terminated five years after his/her return to work from the compensable accident. The WCB would, at that time, be required to determine what impact the worker's disability may have with respect to the worker's ability to find alternate employment, and to compensate the worker for any actual loss of earning capacity that may arise.

As can be seen from the above examples, there are a myriad of circumstances that can arise which may lead the worker to assert that he/she has suffered an actual loss of earnings because of his/her compensable permanent disability. There are at least two ways in which the legislation can minimize these consequences of the actual loss of earnings method:

(i) restrict the worker's entitlement to seek further adjudication on the issue of his/her actual loss of earnings to a specified time frame, and/or

(ii) preclude the worker from seeking further compensation benefits unless there has been a material change in the worker's circumstances.

I do not believe that the adoption of either of the above two restrictions would be fair or appropriate. As discussed previously, under the actual loss of earnings method, a permanently disabled worker would only be entitled to receive compensation payments from the WCB in the event he/she actually suffered a loss of earnings as a result of the compensable injury. To accept an arbitrary time limit on such entitlement, no matter how lengthy the time period that might be, defeats the rationale of why such a method would be adopted in the first place.

For example, under the Ontario legislation a review of the worker's actual loss of earning capacity arising from his/her compensable permanent disability is precluded after 72 months have elapsed from the date of the worker's injury. Assume the following hypothetical situation:

(i) Two workers each suffer a severe permanent disability while working for the same employer, but the incidents occurred 6 months apart.

(ii) Both workers were able to return to employment with their pre-injury employer.

(iii) The employer subsequently shuts down its business for economic reasons. The shutdown occurs 74 months after the first injury date, and 68 months after the second injury date.

In the above scenario, the second of the injured workers would be entitled to receive full compensation benefits for any actual loss of earnings he/she may suffer as a result of the employer's shutdown, while the first injured worker would receive nothing. I do not see the fairness in this result, and I am not prepared to adopt it.

Similarly, the legislation could exclude the permanently disabled worker from seeking further compensation benefits unless there has been a material change in the worker's circumstances. (This is in fact what the Royal Commission recommended in its Recommendation #130 on page 24 of its *Final Report*.) The obvious question to be answered is what would constitute a "material change" in the worker's circumstances. For example, consider the case of a permanently disabled worker who needs to be absent from work for a specified number of actual days due to his/her compensable disability. Assume that the worker is not entitled to receive any sick leave benefits from his/her employer, and therefore suffers an actual loss of earnings whenever he/she is temporarily absent from work due to the compensable disability.

Although I do not believe the worker should be entitled to receive further compensation benefits from the WCB when his/her actual loss is trivial or insignificant, where does one draw the line for a "material change" to have occurred in the above example? Would the worker need to be absent for at least one day; for more than one day; for a week; for a month?

Since the worker in the above example would not have received any compensation benefits from the WCB for the "presumed" loss of earnings which would be expected to arise from his/her compensable disability, I simply cannot accept that the worker could be denied subsequent benefits when he/she does suffer an actual loss of earnings which exceeds a trivial or insignificant amount. Accordingly, I have great difficulty in accepting the "material change" restriction to the actual loss of earnings method of determining the pension entitlement of a permanently disabled worker.

I am therefore faced with a bit of a dilemma. On the one hand, I have concerns with respect to the continuation of the mandatory application of the Dual System of pension calculation. On the other hand, the administrative and adjudicative difficulties associated with the primary alternative – the adoption of the actual loss of earnings method as I envision it – are substantial.

Upon reflection, and based upon other revisions I will be proposing with respect to the pension awards provided to permanently disabled workers, the continuation of the existing Dual System is my preferred alternative. Accordingly, I make the following recommendations:

(i) The Dual System of calculating pension entitlement in BC, as provided for in Sections 23(1) and (3) of the *Act*, should be retained. However, in my opinion, the emphasis of the WCB's published policies must be placed upon utilizing the loss of function method when determining the pension entitlement of a permanently disabled worker. As will be discussed below, the loss of earnings method should only be used in those "special instances" when the pension award calculated pursuant to the loss of function method is considered to be significantly inadequate insofar as the individual worker's particular circumstances are concerned.

As a result of the mandatory application of Section 23(3) of the *Act* in every case where a pension award is assessed, as required by the existing published policies of the WCB, the BC workers' compensation pension system has become a de facto "actual loss of earnings" system, with the loss of function method providing a guaranteed minimum level of pension in each case. In my opinion, this was not the legislative intent with respect to the application of Sections 23(1) and (3) of the *Act*.

(ii) The payment of compensation benefits for permanent impairment, based on the "actual loss of earnings" method and the provision of a "non-economic loss" benefit, should not be adopted in the legislation.

Based upon my recommendation that the Dual System should be retained, I further recommend that the WCB conduct a review of the Permanent Disability Evaluation Schedule ("PDES") to ensure it is reflective of current medical/scientific knowledge, and can be readily understood by the decision-makers who must utilize it. I raise the following comments for the WCB's consideration when conducting this review:

(i) Pursuant to Section 23(1) of the *Act*, the percentages set out in the PDES must reflect the estimated impairment of the worker's earning capacity arising from the nature and degree of his/her injury. The specified percentage should not simply reflect the percentage of medical impairment which the injury represents vis-à-vis the total disability of the person.

(ii) Section #39.10 of the Claims Manual states the following:

> The Permanent Disability Evaluation Schedule is a set of guide-rules, not a set of fixed rules. The Disability Awards Officer or Adjudicator in Disability Awards is still free to apply other variables in arriving at a final pension; . . .

In my opinion, if a worker suffers a permanent physical or psychological impairment that is specified on the PDES, then all decision-makers within the workers' compensation system should be required to apply the percentage indicated in the PDES for that impairment. As I discussed previously (in the section of this Report entitled "Policy Issues"), all decision-makers within the system must consider and apply the published policies of the Board of Directors which are applicable to the determination of the matter before them. The application of the PDES should not be an exception. To provide the decision-maker with this discretion (to not apply the applicable percentage set out in the PDES) simply invites an appeal from an affected worker when the decision-maker does actually follow and apply the WCB's published policy as reflected in the PDES.

Accordingly, I recommend that Section #39.10 of the Claims Manual be revised by the WCB to require all decision-makers within the worker's compensation system to apply the applicable percentage (or range of percentages) when the specified physical or psychological impairment under consideration is listed on the PDES.

(iii) Where a range of percentages is utilized with respect to the impairment of earning capacity associated with a particular physical or psychological injury which is specified on the PDES, the WCB should endeavor to keep the range within a narrow scope (which should be defined as a range of no more than 5%).

My reasoning is that the determination of what percentage, from within a specified range of percentages, should be applied in a particular case is a matter of discretion and judgment being exercised by the initial decision-maker. Provided that the decision-maker is acting in good faith, his/her exercise of judgment, within the identified range of percentages, should not be second-guessed on appeal by subsequent decision-makers.

Accordingly, I have previously recommended (in the section of this Report entitled "Appellate Structure") that the standard of review should be limited on appeals involving the application of the indicated percentage of impairment of earning capacity when the specified physical or psychological impairment under consideration is listed on the PDES. However, this limitation on the standard of review would only apply when the percentage specified on the PDES has no range, or has a range which does not exceed 5%. When the range of percentages does exceed 5%, the exercise of the decision-maker's discretion within the broader range has a potentially much greater impact on the worker's entitlement to a functional pension award, and therefore warrants the broader standard of review upon an appeal of the initial decision-maker's determination.

(iv) It is my recommendation that the percentages of impairment of earning capacity listed on the PDES should not contemplate a component for any expected level of pain associated with the particular impairment. I will be elaborating on this point later in this section when I address the topic of how chronic pain should be compensated under the Act.

(v) The WCB should develop an appropriate process by which it can conduct an ongoing review of the impairment percentages listed on the PDES to ensure that the PDES maintains currency with emerging medical/scientific knowledge.

D. Section 23(3) of the *Act*

I want to return to the issue of the mandatory application of the Dual System in every case where a pension award for a permanent disability is being assessed. The first point to note is that the mandatory application of the Dual System does not arise from any provision in the Act. To the contrary, Section 23(3) is quite permissive in its nature, and in my opinion it provides the WCB with significant discretion in determining when to utilize the projected loss of earnings method.

The mandatory application of the Dual System arises from the published policies of the WCB (as previously reviewed). As observed by the Royal Commission, the WCB's current policy interprets the words "where the board considers it more equitable" as meaning that Section 23(3) "should be employed where it would result in higher benefits". In my opinion, this interpretation of the WCB's discretionary authority pursuant to Section 23(3) does not meet the original intent of the provision.

Chief Justice Sloan, in his 1952 Report relating to "*The Workers' Compensation Act and Board*" recommended that Section 22(3) (now Section 23(3)) be incorporated into the Act. (See page 155 of the Report.) On page 158, Chief Justice Sloan raised the following observation (concerning what is now Section 23(3)):

> The wage-loss method has its place in special instances, and the amendments I recommend allow the Board to adopt this system where it is deemed equitable so to do. (Emphasis added)

This initial conception of utilizing the loss of earnings method in "special instances" was also reflected in the reasoning of the former Commissioners of the WCB in 1979 when they decided to expand the use of Section 23(3) to a "few exceptional cases" involving non-spinal injuries. The current published policy of the WCB, which requires the mandatory application of Section 23(3) in every case where a pension award is being assessed, has obviously strayed considerably from the initial intent and application of the provision. In my opinion, it is time for the governing body of the WCB to revisit the matter.

It is important to emphasize that the determination of what is "equitable" is a matter of policy, and therefore clearly falls within the responsibility of the governing body of the WCB. A proper determination of what is "equitable" cannot be based solely on one factor – which appears to be the focus of the current published policy (which requires Section 23(3) to be employed whenever it results in higher benefits). As discussed in the section of this Report entitled "Policy Issues", policy-making generally involves a consideration of a broad, and often competing, range of factors, such as an evaluation of the impact which various permissible options may have on the workers' compensation system; the application of values on the part of the policy-makers in selecting the preferred policy; the consideration of the views of the interested stakeholders; and a balancing of the benefits and costs of the various options.

Accordingly, it is my recommendation that the Board of Directors revisit the intent and application of Section 23(3) of the *Act*, and redefine those "equitable" circumstances when the loss of earnings method of pension assessments should, and should not, be utilized within the BC workers' compensation system. The determinations reached by the Directors will become the published policies of the WCB, and therefore will have to be applied by all decision-makers within the workers' compensation system.

It has been suggested that I should recommend a revision to Section 23(3) to narrow its application, rather than leave the issue to the determination of the new Board of Directors. I obviously have not accepted this suggestion. In my opinion, the current provision in the *Act* adequately captures the initial intent to permit the WCB to apply the loss of earnings method in those "special instances" where the WCB considers it is equitable to do so. To revise the legislation to narrow the focus of Section 23(3) (for example, by replacing the words "where the board considers it more equitable" with "in those exceptional circumstances as determined by the board") would unnecessarily restrict the broad discretion currently provided to the governing body of the WCB to respond to emerging circumstances.

The concerns associated with the mandatory application of the Dual System (such as the concern expressed in the WCB Briefing Paper, referred to previously, with respect to the long-term viability of the workers' compensation system as a result of the growth of the pension reserve) have arisen as a result of the previous policy choices made by the applicable governing bodies of the WCB. In my opinion, these existing concerns can be, and must be, similarly addressed and rectified through policy.

I acknowledge the difficulties associated with the revision of longstanding policies. Any substantial change always attracts its share of supporters and detractors. I anticipate that there will be some challenges brought by claimants who will be adversely impacted by a revised, and narrower, policy concerning the application of Section 23(3). However, policy determinations fall within the Board of Directors' responsibilities, and those determinations will be effectively protected from such challenges by the application of the "patently unreasonable" standard of review (as recommended previously in the section of this Report entitled "Policy Issues").

E. The Payment of Pension Benefits for the Lifetime of the Worker

Pursuant to Section 23(1) of the *Act*, loss of function pension awards are paid for the lifetime of the worker. Pension awards granted pursuant to the loss of earnings method under Section 23(3) are, in varying degrees depending on the age of the worker on the date of his/her injury, similarly paid for the worker's lifetime. In my opinion, the payment of pension awards to permanently disabled workers for their lifetime results in a substantial overpayment of compensation benefits. As a result, such lifetime payments are a significant contributor to the concern raised in the WCB Briefing Paper (as previously quoted) with respect to the potential impact the pension reserves (for both loss of earnings and functional awards) have on the long-term viability of the workers' compensation system.

Section #40.20 of the WCB's Claims Manual recognizes that a permanently disabled worker may be less able to accumulate retirement benefits due to his/her compensable disability. As noted on page 18 of the WCB's Briefing Paper:

> The intent of a post-retirement benefit is to provide compensation for that portion of the retirement earnings that the worker has lost due to the work-related disability.

I agree with the above statement concerning the intent of a post-retirement benefit. However, the question to be answered is whether the payment of the full loss of function pension, and some portion, if not all, of the loss of earnings pension, for the lifetime of the worker reasonably accomplishes the objective of providing compensation for the worker's loss. In my opinion, the current system of paying the pension award for the lifetime of the worker does not have any reasonable correlation to the worker's potential loss of accumulated retirement savings.

On a global perspective, it is reasonable to assume that most workers will set aside a portion of their current earnings for their retirement years (above and beyond their CPP contributions). Obviously the amount of such savings will vary from one worker to another. Some workers will, unfortunately, be unable to save anything.

In my opinion, it is not reasonable to presume that most healthy workers put away a substantial portion of their current earnings for their retirement years. However, providing a permanent disability pension award for the lifetime of the worker appears to be based on such a presumption. In particular, the loss that a permanent disability is expected to have on the worker's ability to accumulate retirement benefits appears to be equated to the worker's loss of earnings capacity arising from the disability.

For example, consider a 45 year old worker who is earning a gross annual income of $50,000 at the time he/she suffers a severe back injury at work. The WCB subsequently determines that the worker is 100% unemployable as a result of the injury, and awards the worker a full loss of earnings pension. At the time of the injury, the worker's current pension entitlement from the WCB is $37,500.00 (ie: 75% of $50,000). This pension award is payable for the lifetime of the worker.

This lifetime payment of the worker's pension award appears to assume that the worker's loss of earning capacity will be the same during his/her retirement years as it was during his/her pre-retirement years, since the compensation level paid by the WCB remains the same throughout both. In my opinion, that assumption is unreasonable and must be rectified.

The majority of the Royal Commission reached a similar conclusion on page 89 of its *Final Report*:

> In keeping with the principle that workers' compensation should provide compensation primarily for lost earning capacity resulting from permanent disability, wage-loss benefits should cease upon the worker's anticipated date of retirement, normally on the worker's 65th birthday. At this point, the worker would commence receipt of a retirement income-loss benefit.
>
> The underlying rationale for this approach is that most workers, injured or non-injured, can and should take reasonable measures during their working lives to provide for their retirement income once they cease employment. Since retirement is a normal feature in the lives of all workers, it does not make sense to continue to provide workers' compensation benefits to a worker who would have been retired in the absence of disability as if that worker would have continued to be employed. As such, the intent of the commission's recommendation is to provide compensation for that portion of retirement earnings which the worker lost because of work-related disability.

I believe it is impracticable and unrealistic to try to assess, on an individual basis, the impact the worker's disability may have had on his/her ability to accumulate retirement benefits. Accordingly, in crafting the post-retirement benefit to be paid to a permanently disabled worker, I have focused on what I perceive to be a fair benefit level for all disabled workers.

In all other Canadian jurisdictions (with the exception of the Northwest Territories/Nunavut), economic loss payments to a disabled worker cease upon the worker's retirement (normally considered to be age 65), and a post-retirement benefit is paid. I have fully reviewed all of these legislative schemes for post-retirement benefits. Based upon that review, I make the following recommendations:

(i) Any pension award provided to a disabled worker under the loss of function or loss of earnings method would cease upon the worker attaining the standard retirement age of 65, unless that worker can establish that his/her retirement would in fact have occurred at a date later than at age 65 (in which case the worker's entitlement to the pension award would cease at that later date).

On this point, I agree with the following comment raised by the majority of the Royal Commission on page 90 of its *Final Report*:

> Since 65 is a standard retirement age, it is appropriate to enact a presumption that the worker would have retired upon reaching the 65th birthday. That presumption should be rebuttable in order to avoid injustices

> to workers who would have retired at a later date. In cases where an adjudicator is satisfied, on the usual standard of proof, that retirement would in fact have occurred at a date later than the worker's 65th birthday, the later date should be used for the replacement of wage-loss benefits with retirement benefits.

In Resolution #2000/01/21-03 dated March 16, 2000 (reported at 17 WCR 45), the Panel of Administrators adopted the following as published policy:

> Policy item #40.20 of the *Rehabilitation Services and Claims Manual* is amended to clarify that the Board considers age 65 to be the standard retirement age. The policy is also amended to clearly state that a projected loss of earnings pension may be awarded or continued in whole past the standard retirement age. In these situations, clear and objective evidence will be required to show that the worker would have continued to work past the standard retirement age if the compensable injury had not occurred.

In my opinion, the "clear and objective evidence" test adopted by the Panel of Administrators is an appropriate standard to determine if the rebuttable presumption, as recommended by the majority of the Royal Commission, has been met. In other words, in order to have the pension award continue beyond the standard retirement age of 65, it will require more than the subjective belief of the worker that, but for the work-related disability, he/she expected to be employed beyond age 65.

(ii) All of the legislative schemes I have reviewed provide for an exception to point (i) above where the worker is 63 years of age or older on the date of the injury. In such circumstances, any economic loss payments would continue for a period of 2 years from the date of the injury.

I recommend that a similar exception be incorporated into the BC legislation with respect to the payment of a pension to a permanently disabled worker who is age 63 or older on the date of his/her injury (ie: any pension entitlement would continue for a period of 2 years from the date of the worker's injury).

(iii) In six other Canadian jurisdictions, after the worker has been in receipt of economic loss benefits for a specified period of time, the Workers' Compensation Board is required to set aside an additional specified amount which represents the worker's loss of retirement income. The amount would become payable to the worker as a post-retirement benefit when he/she attains the specified retirement age. In four of these jurisdictions (Manitoba, Ontario, New Brunswick and Nova Scotia), the specified amount is 5% of the loss of earnings benefit paid to the worker; while in the remaining two jurisdictions (Saskatchewan and Yukon), the specified amount is 10%.

In Alberta, the WCB has adopted a policy that once the worker reaches retirement age (normally age 65), the following formula is used to calculate his/her post-retirement benefits:

> (Average Annual Compensation)* x [Number of years of compensable earnings loss (to a maximum of 35 years) x 2%]
>
> *Average annual compensation is based on the Earnings Loss Payment for the five year period ending with the month the worker reaches retirement age.

In Prince Edward Island and Newfoundland, when the worker reaches age 65, the Workers' Compensation Board will pay an amount equal to the worker's loss of pension benefits, if the worker can demonstrate the loss to the Board's satisfaction. Pension benefits considered are employer sponsored pension plans and CPP.

The majority of the Royal Commission preferred the approach taken in Alberta, which it described as "akin to a defined benefit pension plan". On page 90 of its *Final Report*, the majority identified what it perceived as the "key feature" of the Alberta approach:

> The key feature of the Alberta approach is that the worker's ultimate loss-of-retirement income benefits is not subject to the vicissitudes of investment markets. Workers can know, with a high degree of certainty, how much they will receive every month following their 65th birthdays well in advance.

There are several reasons why I prefer the more common approach adopted by the six other Canadian jurisdictions, such as in Ontario:

(a) They are akin to a "defined contribution pension plan". Accordingly, the costs of the post-retirement benefits to the WCB will be immediately known and can be accounted for within the system.

(b) As will be discussed below, I will be proposing that the WCB be required to maintain the post-retirement benefits within a separate investment fund (which I presume can be managed so as to minimize the "vicissitudes of investment markets").

(c) I do not believe that the WCB should be further involved in the financial management of the worker's affairs once he/she reaches the retirement age. I will also be discussing this point below.

Accordingly, it is my recommendation that the WCB be required to set aside an additional amount equal to 5% of each payment to the worker of any pension award calculated pursuant to the Dual System. The amount set aside pursuant to this provision shall be provided to the worker as a post-retirement benefit once the worker's pension entitlement ceases pursuant to point (i) or (ii) above.

(iv) The Manitoba and Ontario legislation both provide the worker with an election to contribute a specified amount towards the worker's post-retirement benefit. (In Manitoba, the worker can contribute up to 5%; in Ontario, the worker's contribution must be equal to 5%.) If the worker does elect to make such a contribution, the specified amount would be deducted by the WCB from the economic loss payments made to the worker. In Ontario, the worker's election to make the 5% contribution is irrevocable.

I believe that this concept (of the worker having an option to contribute to his/her post-retirement benefit) should be included in the BC legislation, on the following basis:

(a) The worker should be entitled to determine, based upon his/her financial situation, what amount, from 1 to 5%, he/she wishes to contribute.

(b) The percentage specified by the worker would be withheld by the WCB from each payment of his/her pension award.

(c) There should be no specified time frame within which the worker must make the election to contribute. Once the election is made, the contributions would be withheld prospectively from each pension payment provided to the worker.

(d) For the sake of administrative ease, I agree with the Ontario perspective that the worker's election to make contributions at a specified percentage should be irrevocable – with one exception. The worker should be entitled to change his/her mind and decide not to make any further contributions. However, any decision by the worker to cease making the contributions should be irrevocable (ie: the worker would not be entitled to re-elect, at some later date, to make contributions to his/her post-retirement benefit).

(v) Several jurisdictions require the WCB to maintain its post-retirement withholdings, as well as any contributions made by the worker, in a fund or reserve separate from the Accident Fund. I believe this is an appropriate concept to adopt in BC.

By maintaining the post-retirement benefit withholdings/contributions in a separate fund, the WCB can apply conservative money management principles in recognition of the fact that the post-retirement benefit amounts are being held as a direct investment for the worker – as opposed to for the WCB itself. (The WCB anticipates earning investment income on the accumulated amount in the Accident Fund. However, any shortfall in such investment income would ultimately become the cost responsibility of employers through increased assessments. On the other hand, the post-retirement benefit will consist of a defined amount costed to the employers (ie: 5% of each pension award paid to the disabled worker), as well as any contributions made by the workers. Any significant investment loss with respect to the post-retirement benefit amounts would therefore be directly absorbed by the worker.)

Accordingly, I believe that the investment of the post-retirement benefit withholdings/contributions should be primarily focused on low or no-risk principles. The investment objectives of safety and income should be paramount over growth. In this manner, the WCB should be able to avoid, or at least greatly minimize, the concern of "the vicissitudes of investment markets" as expressed by the Royal Commission.

Section 54(2) of the Nova Scotia legislation provides that the separate fund "may, with the approval of the Board of Directors, be administered by a recognized financial institution". I believe that the BC WCB should have a similar option, provided that the conservative money management approach, as discussed above, is adopted by the financial institution.

Finally, I note that several other jurisdictions permit the post-retirement withholdings/contributions to be paid into a registered retirement plan, if requested by the worker. I have a concern with this approach which arises in the event the worker is able to access the post-retirement benefit funds before he/she reaches 65. The purpose of the post-retirement benefit is to accumulate an amount which represents the potential loss of retirement savings suffered by the worker as a result of his/her compensable disability. To permit the worker to access these funds prior to his/her retirement would be inconsistent with this objective.

(vi) Section 45(II) of the Ontario legislation requires the Board to provide the worker with an annual statement concerning the retirement benefit which is being accumulated:

> The Board shall provide the worker with an annual statement setting out,
>
> (a) the amounts set aside by the Board in the worker's name in the year;
>
> (b) the amounts contributed by the worker in the year, if any;
>
> (c) the accumulated investment income earned on the amounts referred to in clauses (a) and (b) in the year;
>
> (d) the date when the worker will become entitled to a benefit;
>
> (e) the name of any designated beneficiary; and
>
> (f) such other information as the Board considers appropriate.

Similar information (subject to the discussion in point (viii) below concerning the worker's legal entitlement to designate a beneficiary) should be provided on an annual basis to a permanently disabled worker by the BC WCB (or by any recognized financial institution that may be administering the funds on behalf of the WCB) concerning the post-retirement benefit which is being accumulated for the worker.

(vii) The worker would become entitled to receive the post-retirement benefit withholdings/contributions accumulated by the WCB when the worker's pension award payments cease pursuant to point (i) or (ii) above (which will generally be at age 65).

The legislation in each of the six Canadian jurisdictions (which have similar post-retirement benefit withholdings) contemplates the WCB paying an annuity to the worker from the accumulated post-retirement benefit for either a specified period of time or for the lifetime of the worker. I do not believe that the annuity concept should be adopted in BC.

In my opinion, the WCB should not have any responsibility in managing or administering the financial affairs of the worker once his/her entitlement to a pension award ceases. Such a responsibility only arises for the WCB during the period of time that the disabled worker is suffering an economic loss during his/her "working years".

If the worker had not been disabled, he/she would be responsible, upon retirement, for his/her own financial management. I see no compelling reason why a disabled worker, who reaches the age of retirement, should not be similarly responsible for the financial management of his/her own affairs. In other words, I believe the post-retirement benefit, once it becomes payable, is the worker's to do with as he/she wants. Whether the worker's decision is perceived as being prudent or irresponsible is, in my opinion, no longer any business of the WCB.

(viii) Finally, the question arises with respect to what happens to the accumulated post-retirement benefit if the worker dies before reaching the age of retirement.

In some of the other Canadian jurisdictions, the legislation requires the WCB to pay the amount it withheld to any surviving spouse or other dependants as defined in the statute. If there is no surviving spouse or other dependant, the WCB retains the amount in its Accident Fund. (Any contributions made by the worker would always be paid out by the WCB.)

I do not agree with the concept of the WCB retaining its withholdings under any circumstances. The post-retirement withholdings made by the WCB are being accumulated for the benefit of the worker, whose entitlement to the amount is vested but not yet payable. Upon the worker's death, the full amount of the post-retirement benefit withholdings/contributions must be paid out by the WCB. The question is to whom should the benefit be paid.

The surviving spouse or any other dependants may have their own right to seek compensation benefits from the WCB if the worker's death was related to an occupational injury or disease. However, I do not believe that the surviving spouse or any other dependant has an inherent right to receive the post-retirement benefit, regardless of the cause of the worker's death.

Generally speaking, the accumulated post-retirement benefit should be paid by the WCB to the worker's estate. However, an issue arises as to whether the worker can designate a beneficiary to receive the post-retirement benefit in the case of his/her death.

This is an "estates" law issue in which I have no knowledge or experience. Although I do believe a person can designate a beneficiary to receive his/her RRSP contributions in the case of the former's death, the post-retirement benefit being accumulated by the WCB is akin to, but not the same as, an RRSP. Therefore, I do not know if the same rules would apply to the post-retirement benefit.

If the applicable laws would permit the worker to designate a beneficiary, then I certainly would recommend that the worker be entitled to designate whomever he/she wishes to receive the post-retirement benefit in the case of the worker's death. Failing such a designation, the full amount of the accumulated post-retirement benefit would be paid by the WCB to the worker's estate.

F. Employability

My Terms of Reference requested that I address the following questions:

How should employability be assessed for the purposes of a loss of earnings pension? To what extent should non-compensable factors be considered when assessing employability?

1. How should employability be assessed?

As noted on page 23 of the WCB's Briefing Paper, a loss of earnings pension pursuant to Section 23(3) of the *Act* "is intended to reflect a worker's long-term projected loss of earning capacity". In reaching its determination of the worker's long-term projected loss of earning capacity, Section 23(3) requires the WCB to have regard:

> to the difference between the average weekly earnings of the worker before the injury and the average amount which the worker is earning or is able to earn in some suitable occupation after the injury. (Emphasis added)

As noted by the Royal Commission on page 35 of its *Final Report,* significant difficulties may be encountered when the WCB must determine what a worker "is able to earn" in some suitable occupation after the injury:

> Pursuant to Sections 23(3) and 30(1), post-injury earnings or earning capacity are a component of the wage-loss calculation in cases of partial permanent or temporary disability. In some instances, there is little difficulty determining post-injury earnings or earning capacity. For example, for a worker who is ultimately able to return to the time-of-injury employer and job, the determination of post-injury earning capacity would be the wage in that job. In most instances, the worker's pre- and post-injury earnings and earning capacity following the injury would be identical.
>
> The difficulty in determining post-injury earning capacity is significantly greater in other circumstances. Examples include situations where a worker cannot be re-

> employed with the time-of-injury employer, cannot return to pre-injury work with a different employer, cannot be accommodated back into suitable employment with the time-of-injury employer, is employed in a job that does not match the worker's earning potential, or decides to withdraw from the labour force. In many such cases, the board must determine the earning capacity of the worker and the degree to which it has been affected by the work-related disability on a somewhat hypothetical basis.

The process by which the WCB determines the post-injury earnings that a worker is able to earn (in employment that the worker is not currently engaged in, but which the WCB considers is suitable for and reasonably available to the worker) is referred to as "deeming". The WCB Briefing Paper elaborated upon the "deeming" process, from the perspective of assessing a worker for a loss of earnings pension, on pages 23 and 24:

Deeming is the process by which the Board makes a judgment of what a worker "is able to earn" as part of an LOE pension assessment. For the purposes of assessing permanent disability, deeming requires the Board to assess a worker's employability where:

> 1. A worker is assessed for permanent partial disability benefits, and
>
>   - the worker has taken part in a Vocational Rehabilitation ("VR") program such as formal training;
>   - the worker is considered to be employable but does not have a job;
>   - the worker has a job but at reduced earnings;
>   - the worker has for personal reasons, withdrawn from the labour force; or
>   - the worker fails to cooperate with the VR process.
>
> . . .
>
> (Deeming) is based on the notion of employability not employment.
>
> . . .
>
> Deeming employability is based on a long-term projection of the worker's employment potential. The work need not be immediately available.

In my opinion, deeming is a necessary aspect of a workers' compensation system where loss of earnings awards are granted. Further, I believe that the use of the deeming process is mandated by statutory provisions which refer to what an employee "is able to earn", or "is capable of earning", or "could earn" in some suitable occupation after the injury. It is my understanding that every jurisdiction in Canada, which provides compensation for the worker's loss of earnings, uses some process of deeming earnings where the worker is found not to be earning as much as he/she could.

The Royal Commission also recognized that "deeming" is a necessary aspect of any loss of earnings compensation system. On this point, the Royal Commission stated the following in Volume I, Chapter 6 (entitled "Operations: Rehabilitation Division") on page 26 of its *Final Report*:

> The commission notes that in order for the board to determine which method of determining loss-of earnings capacity is "more equitable", some form of deeming must occur in all instances.

Accordingly, in response to the question as to how employability should be assessed for the purposes of a loss of earnings pension, it is my opinion that the deeming process, as currently contemplated by Section 23(3) of the *Act*, must be retained. I do note that the Royal Commission did express concerns with respect to "the frequency and equity" of the deeming process. However, the actual use of the deeming process is a topic that I believe is more appropriately dealt with in the section of this Report entitled "Vocational Rehabilitation".

2. Non-compensable factors

In many cases, there are non-employment/non-compensable factors which are inherent to the worker, and which may significantly impact the potential employability of a permanently disabled worker. The question which arises is whether these non-compensable factors should be accounted for when determining the worker's entitlement to a loss of earnings pension and, if so, how.

These non-compensable factors, and their impact on the determination of a loss of earnings pension award, are identified on page 6 of the WCB's Briefing Paper:

> The number of LOE pensions and the size of the awards are a function of both compensable (injury or disease) and non-compensable factors. Non-compensable factors include personal characteristics (age, education, skills or experience), geographic location, economic conditions (labour market) and social environment (attributes towards and efforts on behalf of workers). These compensable and non-compensable factors impact the success of vocational rehabilitation efforts in identifying suitable occupations that would maximize a worker's long-term earning potential. If these efforts are unsuccessful, increases in the number and size of LOE awards are expected.

In this part of the Report, I will only be addressing the impact of what the WCB Briefing Paper refers to as "personal characteristics" (ie: age, language skills and educational background), which are factors that are inherent to each individual worker. The issue of geographic location/willingness to relocate will be considered later in the section of the Report entitled "Vocational Rehabilitation".

Furthermore, I do not perceive the factor of "economic conditions (labour market)" to be a relevant consideration when determining a worker's entitlement to a pension under the "projected" loss of earnings method pursuant to Section 23(3) – since the relevant focus is on the suitability and availability of employment in the long-term. On this point, I refer to the following excerpts from Section #40.12 of the WCB's Claims Manual:

> The evidence of the Rehabilitation Consultant should relate to jobs that are suitable and reasonably available to the claimant in the long run and the conclusion of the Adjudicator in Disability Awards should be concerned with such of those jobs as will maximize the claimant's long-term earnings potential.
>
> . . .
>
> Where a suitable job is reasonably available over the long-term, it is taken into consideration even though it is not reasonably available at the time of assessment because of general economic conditions.

Returning to the impact of the non-compensable personal characteristics on a worker's employability, I will rely upon the following hypothetical circumstances as the focus of my discussion:

> A worker has been employed as a Labourer at a pulp mill. At age 57, the worker suffers a back injury which precludes his return to manual/physical work. The worker has poor English skills, and a very limited educational background. No opportunity exists for the worker to return to employment with the pre-injury employer.
>
> The worker is physically capable of performing sedentary work, for which he will require retraining (including training for basic computer skills). However, because of his age, poor language skills and limited educational background, the worker is considered to be unsuitable for retraining. As a result, the worker is characterized as being unemployable (and he is awarded a full loss of earning pension pursuant to Section 23(3)).

Although it is undeniable that the worker in the above example has suffered a loss of earnings as a result of his compensable injury (since he can no longer perform physically demanding work), it is the worker's own personal characteristics which render him unsuitable to be retrained, and therefore unemployable. Nevertheless, the current application of the projected loss of earnings method by the WCB often results in the worker receiving a full loss of earnings pension award.

To illustrate my concern with this scenario, consider the same worker who does not suffer a disabling occupational injury, but instead is terminated from his employment for economic reasons. The worker, fully capable of performing physical work, seeks other employment opportunities. In my opinion, the worker's personal characteristics are likely to act as impediments as he competes for available employment opportunities for which he is qualified. Nevertheless, the worker has clearly retained a marketable skill – he is experienced, qualified and capable to perform the physical work of a Labourer. Accordingly, there is a reasonable prospect that the worker will eventually find alternate employment – although his personal characteristics will likely make the search more difficult. Although it is impossible to quantify the impact these personal characteristics will have on the worker's prospects for future employment, in my opinion there is an adverse impact arising from the worker's age, poor language skills and limited educational background.

Now consider the situation where the worker suffers an occupational injury to his back which precludes him from performing physical labour. The worker has lost his primary marketable skill – the ability to perform manual labour. As acknowledged previously, the worker has suffered a significant loss in employment opportunity. There is no doubt that the worker is entitled to be fairly compensated for the impact which the compensable disability has on his ability to find alternate employment. However, in my example it is the worker's personal characteristics which preclude retraining – not his compensable disability. In other words, although the compensable disability has certainly exacerbated the impact which the worker's personal characteristics may have on his employability, the personal characteristics remain and still are a factor contributing to the worker's overall employability prospects. Is it reasonable in these circumstances to totally disregard the significance of these contributing personal characteristics when considering the worker's employability for the purposes of determining his entitlement to a loss of earnings pension award pursuant to Section 23(3) of the *Act*?

In my opinion, the answer to this question is no. However, that does not resolve the issue. The next issue to be considered is how, if at all, can these personal characteristics be accounted for in determining the worker's entitlement to a loss of earnings pension.

Generally speaking, the "thin skull" rule, as developed by the Courts in the context of tortious actions, is applicable to workers' compensation claims. On page 14 of Volume II, Chapter 4 (entitled "The Scope of Compensation Coverage in British Columbia: Determining Work-Relatedness") of its *Final Report*, the Royal Commission described the "thin skull" rule by referring to the following excerpt from the 1997 decision of the Supreme Court of Canada in Athey v. Leonati:

> . . . the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more than they would be for the average person.

As I previously acknowledged, a permanent disability which renders a worker unable to return to his/her pre-injury employment will exacerbate, often to a significant degree, the negative impact which personal characteristics (such as age, poor language skills and limited educational background) may have on the overall employability of the worker. In my opinion, the workers' compensation system must look at the disabled worker as a whole – it would be impracticable, if not impossible, to attempt to carve out part of the worker's overall inherent characteristics in determining the impact the compensable disability had on the worker's ability to find alternate employment. However, this does not mean that the WCB should disregard all of the relevant objective circumstances which may exist when determining the entitlement the worker may have to a loss of earnings pension. For example, I perceive a significant difference between the two workers depicted in the following scenarios:

(i) The same 57 year old Labourer I had previously identified suffers a disabling back injury which prevents him from performing manual labour. The worker had worked for the pre-injury employer as a Labourer for 25 years prior to suffering the injury.

(ii) A worker, who had worked as a Labourer for 20 years with his employer, is terminated for economic reasons at age 55. The worker has poor language skills and limited educational background. The worker has been seeking employment as a Labourer for over a year, but has been unsuccessful. The worker then obtains temporary employment with an employer who is engaged in a renovation project. The temporary employment will last for one year. During the 11th month of the temporary project, the worker (who is now age 57) suffers a back injury which prevents him from performing manual labour.

Although each of the above workers have similar personal characteristics (same age, poor language skills and limited educational background) and have suffered a similar compensable injury, should both be treated the same when calculating any entitlement they may have to a loss of earnings pension? Certainly both workers will be entitled to a similar loss of function award for the compensable back injury they have suffered. However, in my opinion, their overall circumstances are sufficiently distinguishable that it does not necessarily follow each worker should get a similar loss of earnings award.

In the first scenario, the worker had a secure employment relationship prior to the injury. No evidence was presented of any anticipated change to that relationship had the disabling injury not occurred. In the second scenario, the worker was unemployed for over a year and was having difficulty finding alternate employment. The work he eventually obtained was temporary in its nature, and he would have once again been unemployed, seeking alternate employment opportunities, had the disabling injury not occurred.

To provide both of these workers with the same loss of earnings award does not seem appropriate. So how should the workers' compensation system deal with this issue?

In my opinion, there is no need to revise Section 23(3) of the *Act* to attempt to address the potential impact of the personal characteristics of the worker on his/her entitlement to a loss of earnings pension. I believe that Section 23(3) already provides the WCB with the authority to weigh the relevant objective circumstances which may exist when determining the worker's entitlement to a loss of earnings pension. In particular, the opening words to Section 23(3) state "Where the board considers it more equitable, it may . . .". This provides the WCB with broad discretion to evaluate the equities of the circumstances before it.

In conclusion, I reiterate two points I raised earlier:

(i) A permanent disability, which renders a worker unable to return to his/her pre-injury employment, will exacerbate, often to a significant degree, the negative impact which personal characteristics inherent to the worker (such as age, poor language skills and limited educational background) may have on the overall employability of the worker.

(ii) It would be impracticable, if not impossible, to attempt to carve out part of the worker's overall inherent characteristics in determining the impact the compensable permanent disability had on the worker's ability to find alternate employment.

Accordingly, I do not perceive that there will be many cases where the non-compensable personal characteristics of a disabled worker should be taken into account when determining his/her entitlement to a loss of earnings pension pursuant to Section 23(3) of the *Act*. However, I do envision that, on rare occasions, relevant objective considerations may exist where it would be appropriate to do so. I leave it to the WCB to consider what guidance, by way of published policy, can be given on this issue to adjudicators in the workers' compensation system.

G. Disabilities related to Chronic Pain

Under the topic of "Occupational Diseases" in my Terms of Reference, I was asked how the condition of "chronic pain" should be dealt with under the *Act*. However, the topic is more appropriately dealt with in this section of the Report, since the primary focus of the issue is how permanent disability arising from chronic pain should be compensated, if at all, within the workers' compensation system.

In considering this topic, I have reviewed several sources of information, including:

(i) The WCB Briefing Paper dated September 24, 2001 entitled "Chronic Pain";

(ii) The American Medical Association "Guides to the Evaluation of Permanent Impairment (5th ed.)", Chapter 18, entitled "Pain";

(iii) The February 2000 "Report of the Chronic Pain Expert Advisory Panel", and the August 2000 "Report of the Chair of the Chronic Pain Panels", both prepared for the Ontario Workplace Safety and Insurance Board;

(iv) The 1995 Report on "Chronic Pain" prepared for the Workers' Compensation Board of Nova Scotia by Dr. T. J. Murray;

(v) The December 1994 "Chronic Pain Glossary" prepared for the Workers' Compensation Board of BC; and

(vi) The May 27, 1991 "Report of the Task Force on Chronic Pain Syndrome" prepared for the Workers' Compensation Board of BC.

1. Definitions for the purpose of this Report

Each of the above reference materials sets out its own definitions for the purposes of its report. Unfortunately, each document does not necessarily adopt the same definition for the same pain-related disability. Accordingly, I will identify the definitions of the terms I will be using throughout this section. These terms are not intended to be based on the scientific/medical discussions found in the reference material, but instead simply suit my own purposes in dealing with this topic. Obviously greater care in terminology should be taken with respect to any revisions to the legislation or published policy which may arise from this Report.

I first want to define three generic terms – pain, acute pain and chronic pain.

(i) **Pain** – Generally speaking, all of the reference material attributes a common definition to the term "pain", as follows:

> Pain is an unpleasant sensory and emotional experience associated with actual or potential tissue damage, or described in terms of such damage.

Dr. Murray, on the first page of the section of his Report to the Nova Scotia WCB entitled "Brief Summary of the Report", elaborates on the concept of "pain":

> Pain is a unique personal experience that cannot be fully shared by anyone else. We cannot transmit pain, but we can communicate pain by words or by behaviour.
>
> The understanding of pain is complicated further by the fact that the same painful stimulus may be perceived differently by different people, and differently by the same people at different times. The person's reaction to the circumstances surrounding the pain experience and the interpretation of the pain meaning may also be different. Although pain is personal, private and unique, there is often a demand from others that pain and pain situations be objective, public and reproducible.

The AMA Guides (5th ed.) states the following on page 566:

> Pain is a plural concept with biological, psychological, and social components. Its perception is influenced by cognitive, behavioural, environmental, and cultural factors. At first glance, it seems at odds with scientific medicine because of the difficulty accounting for it with obvious pathophysiologic changes.

(ii) **Acute Pain** – The WCB Briefing Paper provides the following definition on page 6:

> Acute pain coincides with a traumatic injury or disease and the early stages of recovery and eventually resolves, either spontaneously or with some form of treatment.

Dr. Murray states the following on the first page of his "Brief Summary of the Report".

> Acute pain is protective. In most instances a local cause is easily recognized, such as a cut finger or sore joint, even though the pain is perceived in the central nervous system. This type of pain responds to analgesic and narcotic medications, and the response to such pain may be modified by cultural and psychodynamic factors.

(iii) **Chronic Pain** – The following definition is set out in the Executive Summary of the Ontario February 2000 "Report of the Chronic Pain Expert Advisory Panel", on page iv:

> Chronic pain is defined as pain that persists six months after an injury and beyond the usual recovery time of a comparable injury; this pain may continue in the presence or absence of demonstrable pathology.

Dr. Murray states the following on the first page of his "Brief Summary of the Report":

> Chronic pain is not protective. It has very complex and multifaceted features, and cannot be understood by simply applying the concepts of acute pain and its causes and treatments. Chronic pain does not respond well to analgesics and narcotics and is resistant to most traditional therapies for pain. There may not be an easily definable local cause. Only a third of the patients note an event or injury as initiating the pain and in most of these instances, the pain seems out of proportion to the suspected underlying disorder or trauma.

As noted on page 6 of the WCB Briefing Paper, "chronic pain is not considered to be a mental disorder".

I will not be addressing the compensation provided for acute pain, since such pain is generally associated with a temporary disability for which wage loss benefits are paid. The focus of my discussion will be on how chronic pain should be compensated when it results in a permanent disability which may adversely impact the earnings capacity of the worker.

There are three separate chronic pain scenarios that I will be addressing in this section.

(i) Ongoing complaints of pain that are reasonably anticipated due to the nature of the objective permanent impairment suffered by the worker. For example, a worker who suffers a significant permanent disability to his/her back will often experience ongoing complaints of back pain. I will be referring to this type of chronic pain as "expected chronic pain".

(ii) Although the nature of the permanent impairment was expected to have chronic pain associated with it, the worker's complaints of pain are significantly disproportionate to the nature and degree of impairment suffered by the worker. I will be referring to this as "disproportionate chronic pain".

(iii) The worker has no objective permanent impairment to account for the chronic pain he/she is experiencing. The BC WCB Task Force on Chronic Pain Syndrome referred to this condition as "Somatoform Pain Disorder". For my purposes, I will be referring to it as "somatoform chronic pain".

I will not be addressing any specific pain disorder that may be medically recognized, such as chronic pain syndrome, fibromyalgia, or myofascial pain syndrome. Instead, it is my intent to address the compensability of chronic pain from a board perspective, which can then be applied to any specific disorder involving chronic pain.

2. Concerns in regard to providing pension awards for chronic pain

Several significant concerns have been raised in regard to providing a permanent disability award to a worker who has chronic pain. **First**, chronic pain is very subjective and personal to each individual worker. As noted on page 566 of the AMA Guides (5th ed.):

> Pain is subjective. Its presence cannot be readily validated or objectively measured. Physicians are confronted with ambiguity as they attempt to assess the severity and significance of chronic pain in their patients. In large part, this stems from the fundamental divide between a person who suffers from pain and an observer who attempts to understand that suffering. Observers tend to view pain complaints with suspicion and disbelief, akin to complaints of dizziness, fatigue, and malaise.

Similarly, Dr. Murray states the following on page 2 of his "Brief Summary of the Report":

> Lastly, it has been difficult to know how to understand and evaluate people with chronic pain, and how to fairly treat and compensate them (fair to the patient and family, fair to the employer, fair to society). Chronic pain is felt only by the patient, is difficult to assess and measure, and is a recognizable problem only because the patient says it is there.

Second, chronic pain is quite common among the general population. On this point, I refer to the following comments raised by Dr. Murray on pages 1 and 2 of his "Brief Summary of the Report":

> Chronic pain is a common condition that has huge financial costs to society. . . .
>
> . . .
>
> Chronic pain occurs in about 11 – 54% of the population in various forms, and can develop without any evident cause, or may develop associated with a stress, or injury or specific illness.

Third, as noted above, chronic pain is difficult to measure and assess. Accordingly, concerns arise in attempting to determine the causation of the worker's chronic pain – ie: is the worker's chronic pain causally related to his/her employment or to some other factor(s)? This concern is most prevalent with "somatoform chronic pain", where there is no objective permanent impairment to which the worker's chronic pain can be attributed.

Fourth, there are cases where the worker has no objective permanent physical or psychological impairment arising from his/her occupational injury or disease, but nevertheless continues to have subjective complaints of pain. Pursuant to the published policies of the WCB, the Disability Awards Officer does have some discretion to award a functional pension solely for the impact that the worker's complaints of pain may have on his/her earning capacity. On this point, Section #39.01 of the Claims Manual states the following:

> Sometimes cases occur where, although the worker has subjective complaints of pain and discomfort, the actual impairment reported by the Disability Awards Medical Advisor or External Service Provider is negligible or too minimal to justify an award of the lowest percentage of disability ordinarily recognized. Where there is appropriate medical rationale to support the subjective complaints, the Disability Awards Officer or Adjudicator still has some discretion to make an award, having regard to the worker's particular circumstances, and may do so where, for instance, there is evidence that the stress of the claimant's occupation or other physical activity could result in an impairment. The Disability Awards Officer or Adjudicator will not grant an award if she or he considers that the impairment is unlikely to affect the claimant's earning capacity. There is, in that situation, felt to be no "impairment of earning capacity" within the meaning of Section 23(1).

As noted on page 9 of the WCB Briefing Paper, "functional awards for subjective complaints are normally granted in the range of 0 – 2.5%". However, once a functional award of any amount is made for subjective complaints, the published policies of the WCB require a separate assessment of the worker's entitlement to be made under the loss of earnings method. The higher of the two pension calculations will then be awarded to the worker. The concern arising from this scenario is described on page 9 of the WCB's Briefing Paper:

> . . . a worker with minimal or no permanent physical or psychological impairment, may be awarded a small percentage for subjective complaints but will also undergo a separate assessment for an LOE pension. By policy, the higher of the LOE and functional pensions will be awarded. In the event that the vocational rehabilitation plan is unsuccessful in returning the worker to pre-injury earnings due to chronic pain, the worker may receive a significant LOE award.

Several examples have been brought to my attention where a worker

(i) had no objective permanent impairment arising from his/her compensable injury,

(ii) received a small functional award for his/her subjective complaints of pain, and then

(iii) was found to be unemployable due to chronic pain and received a 100% loss of earnings pension award.

Fifth, the reference material I have reviewed indicates that a worker who has "somatoform chronic pain" (ie: the worker has minimal or no objective permanent impairment) can, and should, return to work. For example, the following is stated on page i of the Executive Summary of the BC WCB's Task Force on Chronic Pain Syndrome:

> In Somatoform Pain Disorder there is little or no manifest impairment and self-reported disability is disproportionate to the impairment.
>
> Somatoform Pain Disorder therefore does not physically disable the person from working, although the individual perceives this to be the case. Someone with Somatoform Pain Disorder does not risk harm by working; to the contrary work is of physical and psychological benefit to someone with Somatoform Pain Disorder.

Dr. Murray raises a similar point on page 5 of his "Brief Summary of the Report":

> Workers with chronic pain should be strongly urged to return to work almost immediately if there are no objective signs found by the clinician who only needs a good history and physical examination to classify the type of problem and decide on its management.
>
> Pain alone is an insufficient cause to delay resumption of work.

Accordingly, it appears to be contrary to the intent of Section 23(3) of the *Act* to provide a loss of earnings pension award to a worker for his/her chronic pain, when the pain, by itself, "is an insufficient cause to delay resumption of work".

Finally, the WCB Briefing Paper raises the following concern on page 9 with respect to the cost implications of providing pension awards under the Dual System for chronic pain:

> There is growing concern regarding the long-term financial implications of compensating for chronic pain. In particular, concern has been raised that a number of claims are being awarded functional pension awards for subjective complaints, in many cases in the absence of objective physical or psychological impairment, which then results in the consideration of an LOE pension.

3. Should permanent disability awards be provided for Chronic Pain?

In my opinion, a worker should be entitled to receive a permanent disability pension award for chronic pain, which arises from a compensable injury/illness, when the evidence indicates that the worker's chronic pain is likely to adversely impact his/her earning capacity. The reasons for my opinion are similar to those I identified when I addressed the same question with respect to "chronic stress".

First, to exclude all chronic pain claims would, in my opinion, be inconsistent with the purpose and intent of the fundamental principles that led to the establishment of the workers' compensation system, as reflected in the "historic compromise". If it can be established that the worker's disabling chronic pain was "truly work-caused", why should the worker's claim for a permanent disability award be automatically excluded under the *Act*?

The originating event in a claim for chronic pain is the compensable injury or illness suffered by the worker. The acute pain which the worker experiences from that injury/illness is an expected, and therefore compensable, consequence covered under the *Act*. Simply because the worker's pain symptoms have become chronic does not mean that the pain is no longer causally related to the compensable injury/illness. Rather, it is a matter for the initial decision-maker to determine, based on the evidence presented to or obtained by him/her, as to whether the worker's chronic pain is causally related to the compensable injury/illness. If so, and if it is determined that the chronic pain is likely to have an adverse impact on the worker's earning capacity, then it is my opinion the worker is entitled to receive a permanent disability award for his/her condition.

I certainly share the concern raised about "somatoform chronic pain", where there is minimal or no objective permanent impairment, arising from the compensable injury/illness, to which the worker's chronic pain complaints can be attributed. Nevertheless, the fact remains that the worker did initially suffer an injury or illness which was accepted as being compensable under the *Act*, and which caused the worker to experience pain (and I am presuming, for the purposes of this discussion, that the worker did not experience pain before the injury or illness occurred). Although the objective impairment arising from the compensable injury/illness no longer exists, the pain persists. Assuming that there is objective medical evidence which substantiates the worker's chronic pain condition, it is not obvious to me why the worker should be automatically excluded from receiving any permanent disability award for his/her chronic pain.

Second, based on the concerns associated with chronic pain claims, as previously identified, I have no doubt that the adjudication of the compensability of the worker's condition, and of any consequential entitlement the worker may have to a permanent disability award, can be quite difficult. The AMA Guides (5th ed.) succinctly describes the "challenge" the adjudication of such claims entails (on page 586):

> The assessment of pain-related impairment constitutes a substantial challenge, as it is the most common reason for disability, the most subjective, and perhaps

> the most multifaceted. Equitable quantification of impairment requires attention to subjective experiences of pain and emotional distress, as well as reports of behavioral impairment, all of which can only be confirmed indirectly. At times, it seems to present the dilemma of being too difficult to perform and too essential to omit.

Nevertheless, as I have stated on several occasions elsewhere in this Report, it would not be appropriate to exclude any particular type of claim from coverage under the *Act* due to the anticipated degree of difficulty associated with the adjudication of that claim.

Finally, as was the case with respect to the potential exclusion of coverage for "chronic stress" claims, the exclusion of chronic pain claims from any entitlement of a permanent disability award under the *Act* may

(i) lead to such claims being actionable in tort, and/or

(ii) result in a legal challenge being brought pursuant to Section 15 of the Canadian Charter of Rights and Freedoms.

Notwithstanding my belief that permanent disability awards should be provided to worker's who suffer chronic pain arising from a compensable injury/illness, how such compensation benefits should be provided, in light of the existing challenges and troubling features associated with chronic pain claims, must still be addressed.

4. How should a worker's permanent impairment arising from Chronic Pain be compensated?

As noted above, it is my opinion that permanent disability awards should be provided to worker's who suffer chronic pain arising from a compensable injury or illness. Prior to addressing how such compensation benefits should be provided, I want to emphasize what I consider to be two fundamental concepts:

First, the nature and degree of the worker's chronic pain must be found to have an adverse impact on his/her earning capacity in order for the WCB to provide any pension award to the worker for his/her pain. In other words, no pension award can be granted to the worker solely due to the fact that he/she is experiencing chronic pain. Such an award, if not related to any impairment of earning capacity, would in effect constitute a "non-economic loss" benefit – a concept which I previously did not adopt (due to my recommendation to retain the existing Dual System for calculating pension entitlement).

Second, early detection and intervention in the treatment of chronic pain is essential. On this point, I refer to the comments of Dr. Murray on pages 3 and 4 of his "Brief Summary of the Report":

> An important key is early intervention in the process. This not only means early intervention in the development of chronic pain, but attention to how acute pain is treated so that it does not lead so often to chronic pain. In addition early return to work despite pain is essential, as the likelihood of return to work and a full and

active life becomes less likely as the months go by. When it is clear that early intervention is important, the further steps are based on a careful assessment of the problem at that point, coupled with assessment of vocational, psychological and social factors.

Turning to the issue as to how a permanent disability award should be determined with respect to chronic pain, I make the following recommendations:

(i) The *Act* should require the WCB to develop, implement and maintain a permanent impairment rating schedule to be used solely to determine the impact on a worker's earning capacity as a result of chronic pain arising from a compensable injury or illness. This schedule should include the following features:

  (a) The schedule should contain either 3 or 4 levels of permanent impairment to a worker's earning capacity arising from chronic pain. On this point, I refer to the AMA Guides (5th ed.), which has proposed (on page 575) 4 classes of impairment due to pain – mild, moderate, moderately severe and severe. The levels (or classes) must be objectively distinguishable from each other. In the classification system proposed by the AMA Guides, the pain-related impairment would be evaluated based upon the following factors – severity of pain, activity restrictions, emotional distress, pain behaviours and treatment received.

  (b) The WCB will be required to quantify the estimated percentage of permanent impairment of earning capacity for each level of impairment. This is a task which the AMA Guides (5th ed.) did not perform, for the reasons stated on page 570:

  > Third, this chapter assesses pain qualitatively. Because percentages for pain-related impairment have not been used and tested on a widespread basis, as have other impairment ratings used in the *Guides*, it was decided that impairment ratings for pain disorders would not be expressed as percentages of whole person impairment. Future scientific evidence may emerge that will enable a more quantifiable approach to be adopted.

  Notwithstanding the above, it is my opinion that the WCB cannot avoid performing this task. However, the WCB should obviously be willing to review its initial determinations (concerning the levels of impairment and the quantification of the percentage of impairment at each level) based on new scientific evidence which may emerge.

  (c) In recognition of the various concerns identified previously in regard to providing compensation benefits for chronic pain, it is my recommendation that the statutory maximum percentage of permanent impairment of earning capacity arising from chronic pain should be 20%. The difference in the percentage of permanent impairment for each level must be sufficiently large so as to objectively distinguish one level from another.

If the 4 classes of impairment set out in the AMA Guides (5th ed.) are adopted by the WCB, I would propose the following percentages of impairment for each level:

Mild	1–5%
Moderate	10%
Moderately Severe	15%
Severe	20%

(d) The percentage of impairment applicable to the worker would cover the chronic pain experienced by the worker, as well as any other related condition suffered by the worker arising from his/her chronic pain. For example, any permanent disability award granted to the worker for his/her chronic pain, pursuant to the rating schedule to be developed by the WCB, would fully encompass a subsequent diagnosis of depression arising from the chronic pain suffered by the worker.

(ii) In determining a worker's overall entitlement to a loss of function pension award, the WCB would consider the following two components of the worker's impairment of earning capacity:

(a) the percentage of impairment associated with any objective permanent physical or psychological impairment arising from the worker's compensable injury or illness, and

(b) the percentage of impairment associated with the chronic pain experienced by the worker arising from his/her compensable injury or illness.

The above two percentages would be combined to determine the worker's overall loss of function award. In no circumstances would the worker be entitled to receive more than the maximum compensation provided under the *Act*.

The above formula would be applied by the WCB regardless as to whether or not the worker has an objective permanent physical or psychological impairment. For example, in the case of severe "somatoform chronic pain", the worker's entitlement to a loss of function pension award would be determined in the following manner:

(a) percentage of impairment associated with any objective permanent physical or psychological impairment	0%
(b) percentage of impairment associated with chronic pain	20%
Overall loss of function award =	20%

(iii) It is recognized that several of the percentages of impairment listed on the WCB's existing PDES are intended to cover the "expected chronic pain" associated with the objective permanent physical or psychological impairment. A similar recognition is found in the AMA Guides (5th ed.), where it is stated (on page 571) that Chapter 18 (dealing with the rating of pain-related impairment) should not be used "for any condition that can be adequately rated on the basis of the body and organ impairment rating systems given in other chapters of the Guides".

Nevertheless, it is my recommendation that the percentage of impairment of earning capacity for any objective permanent physical or psychological impairment (whether or not listed on the PDES), arising from the worker's compensable injury or illness, should not include any component for the expected level of pain associated with the particular impairment. Instead, the percentage of permanent impairment of the worker's earning capacity arising from his/her chronic pain, if any, would in each case be separately evaluated pursuant to the rating schedule to be developed by the WCB.

The purpose of my recommendation is to avoid the situation which will often arise when the worker believes his/her pain experience is greater than what is "expected", and therefore the worker seeks a further pension award for the "greater" impairment caused by his/her chronic pain. As noted previously, each worker's experience with pain will be subjective and personal to that worker. Each worker's complaints of chronic pain should therefore be individually assessed to determine:

(a) whether the complaints of chronic pain are causally related to the worker's compensable injury or illness;

(b) if so, whether the worker will likely suffer a loss of earning capacity as a result of his/her chronic pain; and

(c) if so, what is the level of impairment to the worker's earning capacity associated with his/her chronic pain.

(iv) The worker would not be entitled to be assessed for a loss of earnings award arising from his/her chronic pain, or from any related condition arising from his/her chronic pain. The full amount of the worker's pension entitlement for chronic pain, if any, would be determined pursuant to the rating schedule for chronic pain to be developed by the WCB.

Accordingly, Section 23 of the *Act* should be revised, effective upon the WCB's implementation of its rating schedule for chronic pain, so as to exclude the application of the projected loss of earnings method, pursuant to Section 23(3) of the *Act*, for any permanent impairment of the worker's earning capacity arising from his/her chronic pain, including any other related condition arising from the worker's chronic pain.

(v) Although the projected loss of earnings method would not apply to the worker's complaints of chronic pain, the WCB would still be required, pursuant to its existing published policies, to consider the Dual System with respect to any objective permanent physical or psychological impairment which the worker may have suffered as a result of his/her compensable injury or illness. The worker would still be entitled to receive the higher of the loss of function method (composed of its two components as discussed previously) and the projected loss of earnings method.

I refer to the following examples by way of illustration:

(a) A worker suffers a back injury which leaves him with an objective permanent physical disability assessed at 5%, and with moderate complaints of chronic pain which is assessed at 10%. Combined, the worker is entitled to a loss of function award of 15%.

A loss of earnings assessment is also conducted in regard to only the objective permanent back impairment suffered by the worker. It is determined that the physical impairment will result in a 20% loss of earnings award.

The worker would therefore be entitled to receive the higher 20% loss of earnings award.

(b) Same example as (a) above, with the one exception that the worker is assessed with severe complaints of chronic pain (at 20%). In this case, the worker's combined loss of function award is 25%, which is the higher of the two calculations.

(c) A worker suffers an injury to his neck, which is assessed as having no objective permanent impairment. However, the worker has mild chronic pain complaints which are likely to impair his earning capacity. He is assessed at 5% for his chronic pain.

Since the worker did not suffer an objective permanent impairment arising from his neck injury, no consideration would be given to the loss of earnings method.

(vi) In those cases where the worker is unable to return to employment as a result of his/her chronic pain complaints, the WCB will be required to utilize the deeming process to determine what loss of earnings the worker may have suffered arising solely from the objective permanent physical or psychological impairment associated with the compensable injury/illness. In my opinion, this is a natural consequence which arises from my recommendation that the loss of earnings method will only be applied to the objective permanent physical or psychological impairment – and not to the worker's complaints of chronic pain.

5. The Nova Scotia Experience

Effective February 1,1996, Nova Scotia adopted, by statute, the "Functional Restoration Program" ("FRP") to deal with (what I refer to as) "disproportionate chronic pain" and "somatoform chronic pain". The WCB Briefing Paper describes Nova Scotia's FRP on page 11:

> The FRP is a two-phase program designed to help injured workers prevent and manage chronic pain and assist in return to work. The pain-targeting services offered during phase 1 and phase 2 complement the services already provided to treat the compensable injury or disease. Phase 1 services are capped at $2,000 per client and phase 2 services are capped at $8,000 per client. While participating in the program, workers are entitled to compensation benefits; however, entitlement to pain-specific services and benefits ends when the program is completed.

The Nova Scotia approach is one of several potential responses to a very challenging issue. However it is not my preferred approach. My primary concern with the Nova Scotia FRP is that it basically cuts off any entitlement to benefits and/or treatment services after a specified period of time. Once the WCB has accepted the worker's chronic pain as being a compensable consequence of his/her work-related injury/illness, I do not believe that the WCB should simply terminate its responsibility at a given time.

In my opinion, the difficulties and uncertainties surrounding the compensability of chronic pain can be accounted for by the workers' compensation system in a fair and reasonable manner which does not necessarily result in the termination of all benefits at a fixed point in time. I have attempted to achieve this fair and reasonable objective through my recommendations in this section.

H. Commutations

Section 35(2)(a) of the *Act* provides:

> The board may in its discretion
>
> (a) commute all or part of the periodic payments due or payable to the worker to one or more lump sum payments, to be applied as directed by the board;

The WCB's published policies, concerning the commutation of permanent disability awards, are set out in Sections #45.00 to #45.61 of the Claims Manual. Section #45.10 identifies the general circumstances as to when the WCB will, and when it will not, exercise its discretion to commute a permanent disability pension award:

A. Where

   1. a compensable disability has been assessed at not more than 10% of total disability,

   2. the pension is not more than $100.00 per month, and

   3. the commuted value is not more than $40,000.00,

   a lump sum will be awarded in lieu of a monthly pension.

B. In any case not within Category A, where

   1. the pension is not more than $125.00 per month, and

   2. the commuted value is not more than $60,000.00,

   the worker will usually be offered a choice of a monthly pension or a lump sum.

C.
   1. If the pension is more than $125.00 per month, or

   2. the capitalized value exceeds $60,000.00,

   the award will consist of a monthly pension and commutation will only be considered under the circumstances outlined below.

As indicated above, the general rule is that if the periodic payment to the disabled worker is more than $125.00 per month, or the capitalized value exceeds $60,000.00, no commutation will be granted. However, certain exceptions are set out in the published policies where the WCB may grant a commutation when the WCB determines it is in the worker's long-term interests to do so.

The Royal Commission considered the issue of commutations in Volume II, Chapter 1 (entitled "The Adequacy of Benefits") of its *Final Report*, on pages 81 to 84. The Royal Commission reached the following conclusion on page 84:

> An important feature of worker's compensation legislation is to provide assured income continuity for lost earning capacity. As discussed elsewhere in this report, the system is to some extent concerned with ensuring that the basic needs of workers and surviving dependants are met by the compensation provided under the Act. Amending Section 35 to allow for the automatic granting of large lump-sum payments for workers or dependants who require long-term assistance could seriously compromise these objectives. Therefore, the commission is of the view that commutation issues should not be determined solely by reference to the wishes of the party entitled to benefits.

> The commission has considered the criteria the board has established for making decisions regarding commutation, and finds that they are sound. . . .
>
> The commission therefore does not propose any amendments to Section 35 or changes to the related policies regarding commutation.

I agree with the Royal Commission's recommendation that there should be no amendment to Section 35(2) of the *Act* nor changes made to the existing published policies of the WCB regarding commutation, with the exception of the one change noted below.

The following sentence is found in Section #45.20 of the Claims Manual:

> No commutation will be allowed in the case of a pension calculated on a projected loss of earnings basis.

I do not perceive the reason why such a total exclusion on the potential commutation of a projected loss of earnings pension is required. If the amount of the projected loss of earnings pension fits within the "cut off" levels set out in Section #45.10 of the Claims Manual, it is my opinion that the same commutation principles should be applicable. Accordingly, it is my recommendation that Section #45.20 of the Claims Manual be revised by the WCB so as to delete the existing exclusion of the commutation principles from any projected loss of earnings pension calculated pursuant to Section 23(3) of the *Act.*

There is one additional point I wish to raise with respect to the commutation of a permanent disability award. I had previously recommended that the WCB must set aside an additional amount equal to 5% of each payment to the worker of any pension award calculated pursuant to the Dual System. This amount would then be paid out to the worker as a post-retirement benefit once the worker's pension entitlement ceases.

It is my recommendation that any commutation of a worker's permanent disability award must take into account the additional 5% amount that he WCB would have set aside as the worker's post-retirement benefit. To illustrate by way of a simple example, assume a disabled worker is entitled to a monthly pension award of $100. If the pension award was not commuted, the WCB would have set aside 5% of that amount (ie: $5.00) each month that the pension award was paid to the worker. Accordingly, any commutation of the worker's pension award must be calculated upon both the monthly pension and the amount that would be set aside for the worker's post-retirement benefit (ie: the total amount to be considered, for commutation purposes, would be $105.00 per month).

As a result, and presuming the post-retirement benefit concept is adopted in the *Act*, the WCB may want to revisit the "cut-off" amounts set out in Section #45.10 of the Claims Manual.

Chapter 11: SURVIVOR BENEFITS

A. Overview

The death of a worker, arising from an occupational injury or illness, is one of the most tragic events in the lives of the survivors. I fully concur with the following comments made by the Royal Commission with respect to the provision of fatality benefits under the Act:

> The area of fatality benefits is particularly challenging. It is one in which a wide range of varying policy choices are available, as is evident from the varying approaches which have been taken throughout the evolution of the applicable provisions in British Columbia and the different approaches which continue to be applied in other Canadian jurisdictions. It is also an area which calls for sensitivity in its treatment of affected parties. The death of a worker is one of the most stressful occurrences in the lifetime of surviving family members. The law and policy dealing with the provision of benefits to surviving family members should be structured in a manner which is sensitive to the grief and trauma caused by the work-related death, and which avoids unnecessary and undue intrusion in the survivors' lives. In the context of a workers' compensation system, this calls for an adjudication process based on reasonable administrative presumptions rather than an inquiry into the specific financial circumstances of surviving dependents. The administration of these benefits should likewise be approached with sensitivity and compassion for the emotional turmoil being experienced by the family.

The Royal Commission addressed the topic of "Fatality Benefits" in both its October 31, 1997 interim "Report on Sections 2 and 3(a) of the Commission's Terms of Reference", on pages 145 to 166 (the "*Interim Report*"), and in Volume II, Chapter 2 of its *Final Report*. Generally speaking, I will be adopting most of the recommendations made by the Royal Commission with respect to the provision of fatality benefits under the Act. Accordingly, in this section I will, for the most part, simply be referring to the applicable discussion and recommendations of the Royal Commission.

However, there are a few recommendations raised by the Royal Commission with which I am not in agreement, or which need to be revised as a result of recommendations I have made elsewhere in this Report. I will elaborate on those areas of divergence in the discussion which follows.

B. Economic Loss Benefits for Surviving Dependent Spouses and Children

1. Applicable Definitions

I accept all of the following recommendations by the Royal Commission, in its *Interim Report*, concerning the existing definitions in Sections 1 and 17 of the Act which are applicable with respect to the provision of fatality benefits to the surviving dependent spouse and/or children of the deceased worker.

(i) The Royal Commission recommended that no changes be made to the definition of "dependant" in Section 1 of the *Act*. (*Interim Report*, page 150.)

(ii) Recommendation #56 (*Interim Report*, page 151), wherein the Royal Commission recommended that:

  (a) the reference to "wife" and "husband" be deleted and that word "spouse" be substituted in the s.1 definition of "member of family" and that the same substitution be made throughout s.17 where the words "wife" and "husband" currently appear;

  (b) the terms "widow" and "widower" be deleted wherein they appear throughout s.17 and the term "surviving spouse" be substituted; and

  (c) the term "spouse" be defined in the act as meaning a person who:

    (i) is married to another person; or

    (ii) has lived with another person in a marriage-like relationship for a period of 2 years where there are no children, and 1 year where there are children, and the marriage-like relationship may be between persons of the same gender.

(iii) Recommendation #57 (*Interim Report*, page 151), wherein the Royal Commission recommended a term to replace "invalid" be used throughout the *Act*.

(iv) The existing definition of "child" in Section 17(1) of the *Act* reads as follows:

  "**child**" means

  (a) a child under the age of 18 years, including a child of the deceased worker yet unborn;

  (b) an invalid child of any age; and

  (c) a child under the age of 21 years who is regularly attending an academic, technical or vocational place of education,

  and "**children**" has a similar meaning.

In Recommendation #58 (*Interim Report*, page 152), the Royal Commission recommended that

(a) the reference to the age of 18 in subparagraph (a) of the definition of "child" be changed to 19, and

(b) the reference to the age of 21 in subparagraph (c) of the definition of "child" be changed to 25.

2. Benefit Levels based upon Permanent Total Disability

The Royal Commission stated the following on page 6 of its *Final Report*:

> Portions of Section 17 of the Act base survivor benefits on amounts which would have been payable had the deceased worker sustained permanent total disability. The commission has recommended elsewhere in this report (*Volume Two, Adequacy of Benefits*), that permanent total disability pensions be paid on the basis of 90% of the net average earnings of the disabled worker. Throughout Section 17, where applicable, calculations should be based upon the recommended 90% of net average earnings (ie: the current recommendation for calculation of permanent total disability pensions).

As I have similarly recommended that permanent total disability pensions be paid on the basis of 90% of the net average earnings of the disabled worker (in the section of this Report entitled "Benefits"), the above quote from the Royal Commission's Final Report is equally applicable to my recommendations with respect to the provision of fatality benefits pursuant to Section 17 of the Act.

I also agree with the following discussion and recommendation raised by the Royal Commission on page 7 of its *Final Report*:

> Under subsections 17(3)(a) - (c) and (f), benefits paid to surviving spouses and dependent children are based, at least in part, on a stated percentage of the pension the deceased would have received had he or she been permanently totally disabled. Subject to the discussion below, the commission supports the general approach of basing such survivor benefits, like permanent total disability benefits, on the deceased worker's average earnings. This serves to relate the benefits, at least to some extent, to losses actually experienced by the surviving members, in that benefits will generally rise in proportion to the worker's average earnings.
>
> Basing survivor benefits on a percentage of the amount which would have been payable as a permanent total disability pension takes account of the fact that a portion of the latter would have gone toward payment of the worker's own expenses in the event of total disability. Relating survivors' benefits to permanent total disability pension calculations takes account of the fact that the family of a deceased worker will have lost the same earnings stream (not counting the worker's personal consumption) as would have been experienced as a result of the worker's permanent total disability.

> As such, the commission recommends that calculation of pension entitlement for surviving spouses and other dependants under Section 17 of the Act continue to be calculated as a percentage of the pension the deceased worker would have received had he or she sustained permanent total disability.

3. Benefit Levels when there are Surviving Dependent Spouse and Children

Sections 17(3)(a) and (b) of the *Act* deal with the situation where the deceased worker is survived by both a dependent spouse and one or more dependent children. The Royal Commission described the application of these two provisions on page 8 of its *Final Report*:

> Under Section 17(3)(a) and (b), where a worker leaves both a spouse and a dependent child or children, pension benefits vary according to the number of children, but not the age or state of health of the surviving spouse. A surviving spouse and one dependent child receive 85% of the amount which would have been payable as permanent total disability benefits. A surviving spouse with two children receives 100% of the permanent total disability amount. Where there are more than two children, an additional $243.62 per month is paid for each additional child. (This reflects the 1998 figure per child, as adjusted for the Consumer Price Index changes pursuant to Section 25.)

Section 17(3)(f) addresses the scenario when there are dependent children, but no surviving spouse. The Royal Commission discussed how this provision is applied on page 8 of its *Final Report*:

> Benefits for orphaned dependant children are addressed in Section 17(3)(f). Again, amounts vary depending upon the number of children. Where a worker leaves no eligible surviving spouse and only one dependent child, the latter is entitled to a pension equal to 40% of the permanent total disability amount. Two surviving dependent children receive benefits equal to 50% of the permanent total amount, and three children an amount equal to 60%. More than three children receive 60%, plus an additional $243.62 per child, as adjusted pursuant to Section 25.

On page 11 of its *Final Report*, the Royal Commission concluded that "the present level of benefits payable under Section 17(3)(a), (b) and (f) are appropriate, and no change is recommended". I accept the Royal Commission's recommendation on this point (subject to my discussion later in this section concerning the existing requirement in Section 17(3) generally that federal CPP benefits must be taken into account when calculating pensions in fatality cases).

Section 17(3)(g) establishes the minimum average earnings on which benefits are to be calculated under Sections 17(3)(a), (b) and (f) (ie: where there are surviving dependent children). On page 9 of its *Final Report*, the Royal Commission recommended no change be made to the minimum established in Section 17(3)(g). I accept the Royal Commission's recommendation.

4. Benefit Level when there is a Surviving Invalid Spouse

Pursuant to Section 17(3)(c) of the *Act*, surviving spouses of any age, who are "invalids", receive an amount equal to 60% of the amount which would have been payable if the deceased worker had at the date of death sustained a permanent total disability. Section 17(3)(c) also specifies a minimum monthly payment which must be paid to the "invalid" spouse, regardless of the average earnings of the deceased worker.

The Royal Commission concluded that the existing level of benefits payable to an "invalid" spouse in Section 17(3)(c), as well as the minimum level specified in that provision, were appropriate, and therefore recommended no change be made. (See pages 11 and 9 of the *Final Report*, respectively.) I accept the Royal Commission's recommendations with respect to the benefits to be provided to a surviving "invalid" spouse.

5. Benefit Levels for Non-Invalid, Childless Surviving Dependent Spouses

Sections 17(3)(c), (d) and (e) provide for a range of benefits payable to non-invalid childless surviving spouses which generally decrease with the spouse's age. In particular,

(i) Section 17(3)(c) provides a surviving dependent spouse, who is 50 years of age or older at the date of death of the worker, with a pension based on 60% of the amount that would have been payable to the worker had he/she sustained a permanent total disability (subject to the specified minimum level of benefit);

(ii) pursuant to Section 17(3)(e), surviving dependent spouses between the ages of 40 and 49 years receive a monthly pension pursuant to Schedule C of the *Act* (which deceases incrementally with each decreasing year of age); and

(iii) under Section 17(3)(d), surviving dependent spouses who are under the age of 40 receive a specified "capital sum" payment which, as of January 1, 2002, is $40,583.21 (ie: no monthly pension award is payable).

On page 12 of its *Final Report*, the Royal Commission identified that its "main concerns regarding the current provisions of Section 17 relate to the age-related distinctions between non-invalid childless surviving spouses". The Royal Commission noted that these so-called "age discrimination" provisions had been the subject of several cases before the Review Board and the Appeal Division based on the Section 15 equality provisions of the Canadian Charter of Rights and Freedoms. Prior to April 1998, these two tribunals had reached contrary conclusions on this issue. In particular, the Review Board found that the distinctions as to pension levels based on age contained in Sections 17(3)(c), (d) and (e) did not contravene Section 15 of the Charter; while the Appeal Division had reached the contrary conclusion, finding that the provisions did violate Section 15 and were not justifiable under Section 1 of the Charter.

The Appeal Division revisited this issue in its April 3, 1998 Decision No. 98-0527 (14 WCR 113). In finding that Sections 17(3)(c), (d) and (e) did not violate Section 15(1) of the Charter, the Appeal Division Panel (chaired by the former Chief Appeal Commissioner) reached the following conclusion on page 215:

> We have found that the scheme in Sections 17(3)(c) to (e) does not offend the equality rights in Section 15(1). By granting the largest benefits to surviving spouses 50 years of age or over and to spouses who are invalids (which are the groups with whom the appellants seek equality), the scheme takes into account the difficulties which those spouses would have in trying to increase their income to compensate for the loss of income due to the work related death of their partners. While vocational assistance is available under the *Act* to all surviving spouses, it is more likely to further the employment prospects of spouses in the younger age categories. Moreover, the scheme does not promote or perpetuate negative stereotypes concerning the groups claiming disadvantage.

The Royal Commission reached a similar conclusion that the age distinctions in Sections 17(3) (c), (d) and (e) did not violate Section 15 of the Charter. In reaching this determination, the Royal Commission made the following comments (on page 12 to 14 of its *Final Report*):

> The commission has concluded that it is appropriate to take some account of needs-based considerations in determining benefit levels for surviving spouses. The commission has also concluded that ability to achieve financial independence is relevant to need. As noted above, such ability will be affected by a spouse's "invalid" status and is also likely to be affected by the presence of dependent children and corresponding child-care responsibilities. Age is another relevant factor, in that older surviving spouses are likely to have fewer employment and/or retraining options which would enable them to replace income previously provided by the deceased worker. At least in the case of older female surviving spouses, a higher level of financial dependence on the deceased worker is statistically likely.
>
> The commission has concluded that a pension based on 60% of permanent total disability payable to surviving spouses 50 years of age or older at the date of death of the worker is appropriate. Many spouses in this age group are likely to be in a similarly disadvantageous position to "invalid" spouses or those with dependent children with respect to their options for achieving financial independence.
>
> . . .
>
> The commission has concluded that the original purpose of the 1974 amendments, as analyzed by the Appeal Division, represents a valid approach to spousal benefits. The justification for the distinction between childless, non-invalid spouses of different ages is that younger spouses on the whole have better prospects for finding work or improving their earnings, and are more likely to be able to achieve financial independence than older spouses. The commission notes that the scheme of the Act is not confined to the provision of

> financial benefits but is also designed to provide rehabilitation and promote income replacement and independence. . . .
>
> The commission believes that the presumption underlying the age distinctions that younger surviving spouses have greater employment opportunities and lesser dependency is valid and is consistent with the underlying needs-based component of the fatality benefit scheme. . . . The commission has therefore concluded that, as a matter of general principle, it continues to be appropriate to vary benefits to some extent according to the age of childless, non-invalid surviving spouses.

I have not conducted any independent research into the issue as to whether the continuation of age distinctions in Section 17 of the *Act* would violate Section 15 of the Charter. However, I am prepared to rely upon the reasoning of both the Appeal Division (in Decision No. 98-0527, supra) and the Royal Commission in accepting the latter's conclusion that "as a matter of general principle, it continues to be appropriate to vary benefits to some extent according to the age of childless, non-invalid surviving spouses".

Notwithstanding the above conclusion, the Royal Commission expressed the following concern (on page 14) with respect to the existing manner in which age distinctions were dealt with in Sections 17(3)(c), (d) and (e) of the *Act*:

> However, the commission has further concluded that the current age-related variations are not appropriately structured and result in too great a difference, both qualitatively and quantitatively, between the treatment of spouses under and over the age of 40.

Of key concern to the Royal Commission was the manner in which the current legislation treated non-invalid childless surviving spouses under the age of 40. On this point, the Royal Commission stated the following on page 16:

> A key problem with the current scheme created by Section 17(3)(c) – (e) is not that it creates distinctions between non-invalid childless surviving spouses of different ages, but that benefits for those under the age of 40 are calculated on a totally different conceptual basis than benefits for all others. In the case of all other spouses, pensions are payable rather than the lump sum payable to those under 40. Furthermore, the pensions are calculated with some degree of reference to the deceased worker's average earnings. Unless the statutory minimums or maximums apply, the latter benefits vary depending upon the worker's actual earnings. Thus, the system recognizes considerations of both loss and need for spouses aged 40 or older. In contrast, spouses under 40 receive a specified and unvarying flat rate pursuant to Section 17(3)(d). The amount is the same irrespective of spouse's actual losses or needs, and no account appears to be taken of either consideration.

Accordingly, the Royal Commission concluded (on page 14) it would adopt a scheme that was "more proportional and rationally connected to the objective of recognizing differences between surviving spouses of different ages". The Royal Commission continued:

> In the commission's view, it is more appropriate to provide pensions for all spouses and to vary the amounts for those under age 50 on a sliding scale which changes in small increments with each year of age, and subject to a minimum amount.

In considering the BC statutory scheme the Royal Commission would recommend in providing pension benefits to non-invalid, childless surviving spouses, it concluded that the Ontario model represented the "fairest approach". The Royal Commission described the Ontario Model on page 16 of its *Final Report*:

> The Ontario model recognizes that younger surviving spouses should receive pensions based on a lower percentage of the worker's average earning than older spouses. Ontario has established a sliding scale of pension entitlement depending on age for all childless spouses between the ages of 20 and 60, and does not create a sharp division in entitlements as Section 17(3)(d) currently does in British Columbia. In Ontario, if a spouse is 40 years of age at the time of death, he or she receives 40% of the net average earnings of the deceased. For each year the surviving spouse is under the age of 40, the pension diminishes by 1% to a minimum of 20%. For each year the surviving spouse is over the age of 40, the pension increases by 1% each year to a maximum of 60%.

However, the Royal Commission felt that one variation had to be made to the Ontario model. The Royal Commission described that variation on pages 17 and 18:

> The commission has concluded that Ontario's requirement that a spouse be age 60 or more at the time of the worker's death in order to receive 60% is inappropriately high, and that 50 is the appropriate age at which a childless, non-"invalid" spouse should receive a pension of 60% of permanent total disability benefits. In the commission's opinion, employment opportunities and levels of dependence for older surviving spouses are not likely to be significantly different at age 60 than at age 50. The commission therefore prefers the existing British Columbia scheme, which provides the maximum pension of 60% 10 years earlier than Ontario, at age 50.

As a result, the Royal Commission made the following Recommendation #155 on page 18 of its *Final Report*:

> The Workers Compensation Act be amended such that the age-related distinctions in Section 17(3)(c), (d) and (e) be repealed and replaced by a provision that states that:
>
> a) childless non-"invalid" surviving spouses age 50 and older at the time of the worker's death, will receive 60% of the monthly amount which would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability; and

b) surviving spouses below 50 years of age at the time of the worker's death will receive 1% less than 60% for each year of age below 50 years of age to a minimum of 30%.

The Royal Commission also noted that the base amount of the pension award (ie: 60% of the monthly amount which would have been payable if the deceased worker had sustained a permanent total disability) would be subject to the statutory minimum specified in the existing Section 17(3)(c).

I accept the recommendations made by the Royal Commission with respect to the revisions to be made in Sections 17(3)(c), (d) and (e) concerning the level of benefits to be provided to non-invalid, childless, dependent surviving spouses.

6. Integration of CPP Benefits

Pursuant to Sections 17(3)(a), (b), (c) and (f), fatality benefits which are payable to surviving spouses and children are adjusted to take into account the federal CPP benefits payable to the surviving dependants, so that "when combined with federal benefits", the pensions will equal the prescribed percentage of amounts which would have been payable in respect of permanent total disability. In other words, the surviving dependant's CPP benefits are "integrated" with his/her worker's compensation fatality benefits.

The Royal Commission described, on page 24 of its *Final Report*, how the WCB applies this integration of CPP and workers' compensation fatality benefits:

> The commission was advised that pursuant to this directive to combine workers' compensation and federal benefits, the board's practice is to deduct from surviving spouses' pensions not only CPP benefits which a spouse receives by virtue of the death of the deceased spouse, but also CPP benefits which the spouse receives as a result of the spouse having retired or reached retirement age.

As previously discussed in the section of this Report entitled "Benefits", under BC's current workers' compensation system, permanently disabled workers who qualify for CPP disability benefits continue to receive their full workers' compensation disability benefits, with no deduction being made to take account of the CPP benefits paid to the worker. In other words, the worker's CPP disability benefits are "stacked" upon his/her worker's compensation benefits.

The Royal Commission recommended that CPP benefits should be integrated with workers' compensation benefits, whether or not the nature of the benefits is for disability or survivor purposes. With respect to the integration of survivor benefits, the Royal Commission stated the following on page 24 of its *Final Report*:

> The commission concluded that whether one adopts a needs-based or loss-based perspective, it makes sense to deduct from the surviving spouse's pension those CPP amounts which have become payable to the surviving spouse as a

> result of the worker's death. Such an adjustment simply takes into account that both the needs of, and losses sustained by, the surviving spouse have been offset by the payment of such CPP benefits. The commission therefore recommends no change with respect to the integration of those benefits with pensions payable under the Act. (Consistent with this, in the chapter *Volume Two, Adequacy of Benefits*, the commission recommended that CPP benefits received by workers as a result of their disability be integrated with workers' compensation benefits.)

However, the Royal Commission did not agree with the WCB's deduction of CPP benefits which the surviving spouse receives as a result of the spouse having retired or reached retirement age. The Royal Commission explained the rationale for its disagreement on page 24:

> However, a similar justification does not apply with respect to CPP benefits payable to the surviving spouse as a result of the latter's retirement. These are benefits which have independently accrued to the surviving spouse as a result of his or her own contribution to the Canada Pension Plan. In many cases, these will already have accrued to the survivor at the time of the worker's death and they have no effect on offsetting either the surviving spouse's resulting losses or existing needs. The commission therefore recommends that no deduction in respect of such benefits be made from pensions payable under the Act.

I agree with the latter recommendation made by the Royal Commission – that CPP benefits payable to the surviving spouse as a result of his/her own retirement should not be integrated, at any level, with the fatality benefits paid to the surviving spouse under the *Act*. Accordingly, I recommend that the following words be deleted from the existing definition of "federal benefits" in Section 17(1) of the *Act*:

> . . ., together with any benefits to which the dependent spouse is or becomes entitled under the Canada Pension Plan as a result of having retired or reached retirement age.

However, I am not in agreement with the Royal Commission's first recommendation – that CPP survivor benefits payable to the surviving dependants should be fully integrated with the fatality benefits paid under the *Act*. On this point, I refer back to the comments I raised previously when I considered the same issue in the section entitled "Benefits". As I noted, my reluctance with respect to full integration of benefits is based on the fact that workers are required to contribute to the CPP. Accordingly, the workers, and their survivors, should have an entitlement to receive disability or survivor benefits under the CPP, at least to the extent of the worker's contribution.

As a result, I make the same recommendation here as I did previously in the "Benefits" section of this Report:

> Accordingly, it is my recommendation that CPP disability and survivor benefits be integrated with the workers' compensation benefits which are payable as a result of the same injury or death, but only to the extent of the employer's percentage of the overall contribution to CPP. It is my understanding that employers currently

pay 50% of the CPP contributions. Therefore, my recommendation would lead to 50% integration of CPP disability and survivor benefits.

7. Duration of Benefits

Under the existing legislation, fatality benefits are paid to the surviving dependent spouse for life Fatality benefits for dependent children are paid for as long as the person remains within the definition of "child" as set out in Section 17(1) of the *Act*.

The Royal Commission's recommendations would not alter these arrangements. On page 19 of its *Final Report*, the Royal Commission identified the alternative approaches it considered with respect to the payment of pensions to surviving spouses:

> The commission considered several alternative approaches to payment of pensions to surviving spouses. In a number of Canadian jurisdictions, pensions paid to surviving spouses cease as of the date when the worker would have reached the age of 65. In others, such benefits continue only for a period of a few years after the worker's death. In contrast, British Columbia, along with Ontario, provide for payment of pensions to surviving spouses for life.
>
> The commission considered limiting the time frame during which surviving spousal pensions would be paid, as well as whether it might be appropriate to recommend an alternative scheme for surviving spouses similar to the one whereby pension entitlements at age 65 accrue to permanently disabled workers. The commission rejected these alternatives in favour of continuing the current practice of paying survivor's pension benefits for the lifetime of the surviving spouse. As a result of the death of the worker, the surviving spouse loses the benefit of the pension entitlements which would have been accumulated by the deceased worker up until age 65 and the benefits the surviving spouse would have received from the accumulated pension entitlement.

I am not in agreement with the Royal Commission's recommendation on this point. In my opinion, the purpose for providing fatality benefits is to provide the surviving dependants with compensation for the economic loss arising from the death of the worker. To provide compensation benefits to the surviving dependants beyond the date that the worker him/herself would have received economic loss benefits from the WCB, had the worker sustained a permanent total disability, is inconsistent with this purpose.

To take the most dramatic example of my concern, assume a worker has a fatal accident at work at age 64½. Pursuant to the Royal Commission's recommendations, that worker, had he/she instead sustained a permanent total disability, would only have been entitled to receive economic loss benefits from the WCB until age 65 (ie: a period of 6 months). Accordingly, the surviving spouse loses the benefit of the pension entitlements, which the deceased worker would otherwise have accumulated had he/she instead sustained a permanent total disability, for a period of 6 months. In such circumstances, to provide fatality benefits for the lifetime of the surviving spouse would result in substantial overcompensation for the economic loss suffered by the surviving spouse.

In my opinion, the duration of the payment of fatality benefits should be tied to the anticipated duration of the economic loss which would have been suffered by the worker had he/she instead sustained a permanent total disability. This focus is similar to the approach taken by the Royal Commission when it based the amount of the fatality benefits on the amount which the worker would have received had he/she sustained a permanent total disability. On this point, I reiterate the following observation noted by the Royal Commission on page 7 of its *Final Report*:

> Relating survivors' benefits to permanent total disability pension calculations takes account of the fact that the family of a deceased worker will have lost the same earnings stream (not counting the worker's personal consumption) as would have been experienced as a result of the worker's permanent total disability.

Accordingly, it is my recommendation that fatality benefits paid to surviving dependent spouses and/or children should cease no later than as of the date when the worker would have reached the age of 65 (or, in the case where the worker was 63 years or older on the date of his/her death as a result of an occupational injury or disease, no later than 2 years after the date of the worker's death).

8. Loss of the deceased worker's accumulated post-retirement benefit

The economic loss experienced by the dependent surviving spouse is not limited to the benefit of the pension entitlement which would have been accumulated by the deceased worker up until age 65 had the worker instead sustained a permanent total disability. The surviving spouse would also have lost the benefit of the accumulated 5% post-retirement benefit amounts that the WCB would have set aside with respect to each pension payment made to the worker, had he/she instead sustained a permanent total disability. (The concept of the post-retirement benefit paid by the WCB to a permanently disabled worker was discussed in the "Pensions" section of this Report.)

To offset this loss, it is my recommendation that the WCB be required to accumulate an additional amount equal to 5% of each pension payment which is allocated to a surviving dependent spouse. This "post-retirement benefit" amount would become payable to the surviving spouse once his/her entitlement to survivor benefits under the *Act* ceases (as discussed in point #7 above). All of my previous recommendations concerning the post-retirement benefit accumulation for, and payment to, a permanently disabled worker (as discussed in the "Pensions" section of this Report) would be equally applicable to the post-retirement benefit being accumulated for the surviving dependent spouse.

9. Apportionment of benefit entitlement when the worker's death arises from an occupational disease

I previously accepted the Royal Commission's recommendation that the calculation of pension entitlement for surviving dependent spouses and children should be based upon the amount payable had the worker sustained a permanent total disability. In the section of this Report entitled "Occupational Diseases", I made the following recommendations:

(i) the *Act* should provide for the apportionment of compensation entitlement based upon the portion of the worker's disease which was causally related to occupational, as opposed to non-occupational, factors;

(ii) the standard for determining whether an occupational or non-occupational factor played a role in the development of the worker's disease would be based on "causative significance";

(iii) once it is determined that occupational factors had causative significance with respect to the development of the worker's disease, there would be four levels of apportionment between occupational and non-occupational factors; and

(iv) the applicable level of apportionment would be applied to any entitlement the worker may have under the *Act* to either temporary wage loss payments or a permanent pension award arising from his/her occupational disease.

Accordingly, the WCB would be required to apply the apportionment approach in calculating the amount of the permanent total disability pension award that would otherwise be payable to a worker whose death was causally related to an occupational disease. It is therefore my recommendation that the same apportionment approach must be applied by the WCB in determining the amount of the pension benefits payable to surviving dependent spouses and/or children where the worker's death is causally related to an occupational disease.

By way of illustration, assume a worker develops lung cancer at age 55, which results in the worker becoming totally disabled. The worker applies for compensation benefits, and the WCB determines that the worker's occupational exposures had causative significance in the development of his disease, as did the worker's history of cigarette smoking. As a result, the WCB apportions the worker's lung cancer as being 50% caused by occupational factors. The worker's entitlement to a permanent total disability pension is therefore apportioned at the 50% level.

Assume the worker subsequently dies at age 57 as a result of his lung cancer, leaving a surviving dependent spouse who is 55 years old. Her entitlement to a survivor's pension (as discussed previously) would be equal to 60% of the monthly amount which would have been payable if the worker, at the date of his death, had sustained a permanent total disability. Accordingly, the surviving spouse's pension entitlement would be 60% of the apportioned permanent total disability payments that the worker had been receiving at the time of his death (ie: the worker had been receiving 50% of a full permanent total disability pension award, and the surviving spouse's pension would therefore be based upon 60% of that amount).

In financial terms (and reflecting the recommendations made elsewhere in this Report), assume the worker's net average annual earnings, as of the date of his death, was $50,000. The worker's permanent total disability annual pension entitlement would therefore be $45,000 (ie: $50,000 x 90%). Due to the application of the apportionment approach, the worker's actual annual pension entitlement would be based on the 50% apportionment level (ie: $50,000 x 90% x 50% = $22,500). The surviving dependent spouse's annual pension entitlement would therefore be calculated as follows – 60% of the permanent total disability which would otherwise be payable at the time of the worker's death (ie: $22,500) = $13,500.

There is one further related issue I wish to address. Section 6(11) of the _Act_ reads as follows:

> Where a deceased worker was, at the date of his or her death, under the age of 70 years and suffering from an occupational disease of a type that impairs the capacity of function of the lungs, and where the death was caused by some ailment or impairment of the lungs or heart of non-traumatic origin, it must be conclusively presumed that the death resulted from the occupational disease.

As is the case with the existing "rebuttable presumption" in Section 6(3) of the _Act_ (as discussed in the section of this Report entitled "Occupational Diseases"), the "conclusive presumption" in Section 6(11) relates to the issue of causation with respect to the death of the worker – not to the level of entitlement of benefits which the surviving dependants of the worker may be entitled to under the _Act_. Pursuant to the existing interpretation of the _Act_ by the WCB, such entitlement is determined by the "all-or-nothing" method. However, under my proposed recommendations, entitlement to compensation benefits, insofar as occupational diseases are concerned, is determined pursuant to the apportionment approach (which will apply equally to the entitlement of disabled workers and to dependent survivors).

As a result, I make the following recommendation concerning the application of the conclusive presumption in Section 6(11) of the _Act_:

> Once it is determined that the requirements in Section 6(11) have been met, the surviving dependants would be entitled to receive fatality benefits based upon the minimum 25% apportionment of the amount that would otherwise have been payable had the worker sustained a permanent total disability. The actual apportionment level applicable to the surviving dependants' entitlement to fatality benefits would depend on whether there were any non-occupational factors which were also found to have had causative significance in the development of the worker's disease which led to his/her death.

10. The Remarriage of a Surviving Dependent Spouse

The Royal Commission made the following Recommendation #159 on page 29 of its *Final Report*:

> The _Workers Compensation Act_ be amended such that pension benefits payable to surviving spouses continue regardless of changes in the surviving spouses' marital status, either through lawful marriage or qualifying common-law relationships.

For the reasons set out on pages 26 to 29 of the Royal Commission's *Final Report*, I accept the above recommendation.

11. The manifestation of a work-related disability after the worker has retired from employment

In the section of this Report entitled "Occupational Diseases", I identified the following anomaly which arises with respect to the utilization of the economic test in Section 6(1)(a) of the *Act*:

> When a worker initially becomes permanently disabled from an occupational disease after his/her retirement from employment, no compensation benefits will be paid. However, if the retired worker subsequently dies as a result of the same occupational disease, his/her dependants will receive survivor compensation benefits from the WCB.

The Royal Commission addressed this anomaly on page 19 of its *Final Report*:

> The commission thus recommends that with one exception, pensions be payable to surviving spouses for the latter's lifetime.
>
> The exception arises where the deceased worker did not manifest any work-related disability until after the worker had retired. In such circumstances it cannot generally be said that any loss of wages or retirement benefits occurred and, on that basis, no compensation should be paid.

I concur with the Royal Commission's comments with respect to the above exception. Accordingly, I recommend the *Act* be revised to specify that fatality benefits for economic loss will not be paid to any surviving dependant of a deceased worker whose work-related disability did not arise until after the worker had retired from employment.

C. Non-Economic Loss Payment to a Surviving Spouse

The Royal Commission stated the following on page 21 of its *Final Report*:

> The commission believes that a lump sum payment to all surviving spouses calculated independently of earnings and varied according to the spouse's age at the time of the worker's death would be an appropriate change to the existing system.

The Royal Commission then explained its rationale:

> The purpose of the lump sum payment would be to defray the cost obligation of capital assets jointly purchased on the expectation of continuing income of the deceased spouse, and would also to some extent, provide recognition of non-economic losses associated with the death of the worker. These include generally non-quantifiable but no less real losses relating to services provided to

> the family by the deceased worker over and above financial contributions from earnings. Further, in light of the obligations which the system places on spouses to replace support previously provided by a worker with the spouses' own income, such a payment would assist surviving spouses with funding improvements in human capital in the form of higher education or other steps aimed at enhancing income-earning opportunities, which are otherwise unavailable or not covered through vocational rehabilitation services or allowances.
>
> As younger spouses will tend to have fewer savings and higher debt obligations (such as mortgages), the need for this lump sum amount will generally be inversely proportional to the age of the surviving spouse, and should be structured accordingly. Therefore the commission recommends that all surviving spouses of deceased workers receive, in addition to pension benefits, a lump sum benefit dependent on their age at the date of death. This benefit should not be calculated on the basis of the worker's average earnings.

After referring to the Ontario model (which provides a similar lump sum benefit to all surviving spouses), the Royal Commission made the following Recommendation #157 on page 23 of its *Final Report*:

> The Workers Compensation Act be amended such that:
>
> a) a surviving spouse receives a lump sum payment equal to $45,000 for a spouse aged 50 years or older at the time of the worker's death and increased by $1,000 for each year the spouse is younger than 50 years, to a maximum of $75,000; and
>
> b) to require that the lump sum payable be periodically adjusted for changes in the consumer price index (Section 25).

I accept the above recommendation made the Royal Commission.

There are two points of clarification I want to raise with respect to the provision of the above non-economic lump sum payment to surviving spouses:

(i) In the case of a worker's death arising from an occupational disease, there would be no apportionment of the lump sum payment to the surviving spouse (based on the causative significance of any non-occupational factors). The reasoning for this result is that the lump sum benefit is intended to be a non-economic loss payment (ie: it is calculated without reference to the loss of earnings to the surviving spouse arising from the worker's death).

(ii) The non-economic lump sum benefit would be payable to a surviving spouse of a deceased worker whose work-related disability did not arise until after the worker had retired from employment.

Finally, Section 17(13) of the *Act* provides:

> In addition to any other compensation provided, a dependent widow or widower, common law wife or common law husband or foster parent in Canada to whom compensation is payable is entitled to a lump sum of $500.

Based upon my acceptance of the Royal Commission's recommendation to provide a much greater lump sum payment to all surviving spouses, I recommend that Section 17(13) of the *Act* be deleted.

D. Fatality Benefits for Persons other than Surviving Spouses and Children

Section 17 of the *Act* contemplates the provision of fatality benefits, in certain circumstances, to persons other than the deceased worker's surviving dependent spouse and/or children. For example, the terms "dependant" and "member of family" are defined in Section 1 of the *Act* as follows:

> **"dependant"** means a member of the family of a worker who was wholly or partly dependent on the worker's earnings at the time of the worker's death, or who but for the incapacity due to the accident would have been so dependent, and, except in section 17(3)(a) to (h), (9) and (13), includes a spouse, parent or child who satisfies the board that he or she had a reasonable expectation of pecuniary benefit from the continuation of the life of the deceased worker;
>
> . . .
>
> **"member of family"** means wife, husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half brother and half sister and a person who stood in loco parentis to the worker or to whom the worker stood in loco parentis, whether related to the worker by consanguinity or not;

The Royal Commission addressed the issue of "Benefits for Survivors other than Spouses and Children" on page 6 of its *Final Report*:

> Various subsections of Section 17 make provision for survivor benefits for other dependants and family member in certain circumstances, as discussed in the commission's *October 1997 Report*. For example, Section 17(3)(h) provides for survivor benefits for "other dependants" and Section 17(3)(i) provides for benefits for certain non-dependent family members who had a "reasonable expectation of pecuniary benefit from the continuation of the life of the worker." The commission dealt with these provisions in the *October 1997 Report*, but noted that to the extent that the provisions related to compensation levels, that aspect would be deferred to the final report.
>
> The commission has now had an opportunity to consider compensation levels for this class of survivors in the overall context of the compensation scheme. It has concluded that current provisions are appropriate and recommends no variation.

I accept the Royal Commission's conclusion and recommendation, as expressed above, with one qualification. Any fatality benefits paid under the Act to such persons, other than surviving spouses and/or children, should cease no later than as of the date when the worker would have reached the age of 65 (or, in the case where the worker was 63 years or older on the date of his/her death as a result of an occupational injury or disease, no later than 2 years after the date of the worker's death).

E. Funeral and Related Expenses

In its *Interim Report*, the Royal Commission noted that the amount paid by the WCB pursuant to Section 17(2) of the Act, for funeral expenses and for incidental expenses related to the death of the worker, was too low, and therefore needed to be increased to reflect actual costs. As a result, the Royal Commission made the following Recommendation #59 (on page 153):

> The commission recommends that:
>
> (a) the amount payable for funeral expenses should be increased to an amount of $6,000, being a consolidation of $5,000 for the funeral and $1,000 for incidental expenses;
>
> (b) the employer should continue to bear the cost of transporting the deceased worker from the worksite to the nearest undertaker;
>
> (c) the amount payable for additional transportation if burial does not take place at the nearest undertaker should be increased from "up to $200" to ""up to $1,000";
>
> (d) the above funeral benefit should be adjusted pursuant to the Consumer Price Index to the date on which the governors' recommendation was made to government;
>
> (e) the transportation allowance should be annually adjusted pursuant to the Consumer Price Index effective from the date of this report; and
>
> (f) these new benefits should apply to new claims.

In 1999, the Provincial Government repealed Section 17(2) of the Act, and replaced it with the following:

> (2) Where compensation is payable as the result of the death of a worker or as the result of injury resulting in the death,
>
> (a) in addition to any other compensation payable under this section, an amount in respect of funeral and related expenses, as determined in

accordance with the policies of the governors, must be paid out of the accident fund,

(b) the employer of the worker must bear the cost of transporting the body to the nearest business premises where funeral services are provided, and

(c) if burial does not take place there, the costs of any additional transportation, up to a maximum determined in accordance with the policies of the governors, may be paid out of the accident fund.

(2.1) No action for an amount larger than that established by subsection (2) lies in respect of the funeral, burial or cremation of the worker or cemetery charges in connection with it.

The effect of the above legislative revision was to remove the specified amounts for funeral expenses, incidental expenses and additional transportation expenses from Section 17(2), and to place the responsibility of determining the appropriate amount for each of these expenses in the hands of the Governors. Arising from the revision to Section 17(2), the Panel of Administrators subsequently approved published policy which adopted the Royal Commission's recommendations. Pursuant to Section #53.00 of the Claims Manual, as of January 1, 2002 the funeral and related expenses paid by the WCB is $6,870.58; and the maximum amount which the WCB will pay for any additional transportation costs, in regard to the worker's burial, is $1,085.50.

I am satisfied that the 1999 statutory revision to Section 17(2) of the *Act*, and the subsequent published policy approved by the Panel of Administrators, implemented the Royal Commission's recommendations concerning the funeral expenses, incidental expenses and additional transportation costs which should be paid by the WCB. Accordingly, I see no reason to recommend any further changes to either Section 17(2) of the *Act* or the published policies of the WCB as reflected in Section #53.00 of the Claims Manual.

There is one further comment I want to raise with respect to this topic. The WCB should continue to be fully responsible for the payment of the above specified amounts in those cases where the death of the worker results from a disease which was causally related to both occupational and non-occupational factors. In other words, I would not recommend the apportionment of any of the expenses paid by the WCB pursuant to Section 17(2) of the *Act*.

F. Other Recommendations made by the Royal Commission in its Interim Report

In its *Interim Report*, the Royal Commission reviewed each subsection contained in Section 17 of the *Act*. With the exception of any issue which related to compensation levels, the Royal Commission made recommendations with respect to most of those provisions.

I have previously considered several of the recommendations contained in the Royal Commission's *Interim Report*. With respect to the remaining recommendations set out in the *Interim Report*, I accept the following:

(i) Section 17(3)(h) – The Royal Commission stated the following on page 156 of its *Interim Report*:

> The commission regards the current scheme as appropriate and does not recommend any changes with respect to the categories of relationships or the priorities set out in s.17(3)(h).

(ii) Section 17(3)(i) – The Royal Commission stated the following on page 156 of its *Interim Report*:

> In the commission's view, this section strikes an appropriate balance in its present form. It is reasonable to limit claims by those who cannot establish dependency, but who can show a reasonable expectation of monetary benefit from the continuation of the worker's life to spouses, children and parents.

There is one revision that will need to be made to Section 17(3)(i) arising from a recommendation I had previously made. Section 17(3)(i) currently provides that the fatality benefit would be paid "for life or a lesser period determined by the board". As I had previously recommended, the reference to the duration of the benefit payment will have to be revised to the date the worker would have reached age 65 (or, if the worker was 63 years or older at the time of his/her death, for a maximum period of 2 years from the date of the worker's death).

(iii) Section 17(3)(j) – I accept the Royal Commission's Recommendation #60 (on page 157 of its *Interim Report*) concerning the provision of fatality benefits to a foster parent. However, the concluding words of Section 17(3)(j), which deal with the duration of the payment of the benefits to a foster parent, must be revised to reflect my previous recommendation on the duration of the payment of fatality benefits.

(iv) Section 17(4) – On page 158, the Royal Commission recommended no change be made to Section 17(4).

(v) Section 17(5) – On page 158, the Royal Commission recommended no change be made to Section 17(5).

(vi) Section 17(6) – I accept the Royal Commission's Recommendation #61 (on page 159 of its *Interim Report*).

(vii) Section 17(7) – I accept the Royal Commission's Recommendation #62 (on page 160 of its *Interim Report*).

(viii) Section 17(8) – I accept the Royal Commission's Recommendation #63 (on page 160 of its *Interim Report*).

(ix) Section 17(9) – I accept the Royal Commission's Recommendation #64 (on page 162 of its *Interim Report*) with respect to Section 17(9)(a). The Royal Commission recommended (on page 162) no change be made to Section 17(9)(b).

(x) Section 17(10) – On page 162, the Royal Commission recommended no change be made to Section 17(10).

(xi) Section 17(11) – I accept the Royal Commission's Recommendation #65 (on page 163) that Section 17(11) should be deleted from the *Act*.

(xii) Section 17(12) – I accept the Royal Commission's Recommendation #66 (on page 164 of its *Interim Report*).

(xiii) Section 17(14) – On page 165, the Royal Commission recommended no change be made to Section 17(14).

(xiv) Section 17(15) – The Royal Commission stated the following on page 165 of its *Interim Report*:

> The commission notes that this section raises similar issues to those identified in connection with the deduction of Canada Pension Plan benefits (stacking and integration). That issue has been deferred to the final report, therefore the commission recommends no change to section 17(15) at this time.

Although the Royal Commission did address the issue concerning CPP benefits in its *Final Report*, it made no further reference to Section 17(15). I agree with the Royal Commission's initial recommendation in its *Interim Report* that no change should be made to Section 17(15).

(xv) Section 17(16) – The Royal Commission stated the following on page 165 of its *Interim Report* concerning Section 17(16):

> This section raises issues similar to those raised in connection with the termination of benefits upon remarriage. As this involves a review and examination of the overall rationale of the system, the commission will address these issues in its final report.

Although the Royal Commission did address the issue concerning "remarriage" in its *Final Report*, it made no further reference to Section 17(16). In my opinion, Section 17(16) should remain in the legislation. However, the reference at the end of the provision to "or more than 75% of the amount referred to in Section 33(6)" will need to be revised to reflect my previous recommendation to calculate benefit entitlement upon "90% of net earnings".

(xvi) Section 17(17) – on page 165, the Royal Commission recommended no change to Section 17(17).

Chapter 12: VOCATIONAL REHABILITATION

A. Overview

Section 16 of the *Act* is entitled "Vocational Rehabilitation", and reads as follows:

> (1) To aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap, the board may take the measures and make the expenditures from the accident fund that it considers necessary or expedient, regardless of the date on which the worker first became entitled to compensation.
>
> (2) Where compensation is payable under this Part as the result of the death of a worker, the board may make provisions and expenditures for the training or retraining of a surviving dependent spouse, regardless of the date of death.
>
> (3) The board may, where it considers it advisable, provide counselling and placement services to dependants.

Most of my focus in this section of the Report will be on Section 16(1) – the provision of vocational rehabilitation services to injured workers. I will consider Sections 16(2) and (3) (dealing with the provision of vocational rehabilitation services to dependants of a deceased worker) separately in the last part of this section.

The Royal Commission considered the topic of "Operations: Rehabilitation Division" in Volume I, Chapter 6 of its *Final Report.* I will be referring to the Royal Commission's discussion throughout this section. I will also be referring to the WCB's September 24, 2001 Briefing Paper entitled "Vocational Rehabilitation".

There are two immediate observations to make in regard to Section 16(1) of the *Act*. **First**, it provides a very broad discretion to the WCB to take the measures and make the expenditures "it considers necessary or expedient" to aid in getting injured workers back to work or to assist in lessening or removing a resulting hardship.

Second, there is no statutory direction provided in Section 16(1) with respect to the guiding principles which the WCB must follow in exercising its discretion. As a result, the role of the published policies of the WCB, with respect to the provision of vocational rehabilitation ("VR") services to injured workers, is of the utmost importance.

The WCB Briefing Paper described the "mission" of the Vocational Rehabilitation Services Department on Page 5:

> The mission of the VR Services Department is to provide quality intervention and services to assist clients in achieving quality return to work and other appropriate rehabilitation outcomes. Quality rehabilitation maximizes the effectiveness of rehabilitation resources and worker-employer outcomes.

The WCB Briefing Paper notes (on page 6) that the "goal" of VR, in the case of a permanently disabled worker, "is to maximize a worker's long-term earnings capability".

Section #85.40 of the WCB Claims Manual sets out the following three VR service objectives:

> The objectives of Vocational Rehabilitation Services are:
>
> 1. To assist workers in their efforts to return to their pre-injury employment or to an occupational category comparable in terms of earning capacity to the pre-injury occupation.
> 2. To provide the assistance considered reasonably necessary to overcome the immediate and long-term vocational impact of the compensable injury, occupational disease or fatality.
> 3. To provide reassurance, encouragement and counselling to help the worker maintain a positive outlook and remain motivated toward future economic and social capability.

Section #85.30 of the Claims Manual identifies the following seven "guiding principles of quality vocational rehabilitation":

> 1. Vocational rehabilitation should be initiated without delay and proceed in conjunction with medical treatment and physical rehabilitation to restore the worker's capabilities as soon as possible.
> 2. Successful vocational rehabilitation requires that workers be motivated to take an active interest and initiative in their own rehabilitation. Vocational programs and services should, therefore, be offered and sustained in direct response to the commitment and determination of workers to re-establish themselves.
> 3. Maximum success in vocational rehabilitation requires that different approaches be used in response to the unique needs of each individual.
> 4. Vocational rehabilitation is a collaborative process which requires the involvement and commitment of all concerned participants.
> 5. Effective vocational rehabilitation recognizes workers' personal preferences and their accountability for independent vocational choices and outcomes.
> 6. The gravity of the injury and residual disability is a relevant factor in determining the nature and extent of the vocational rehabilitation assistance provided. The Board should go to greater lengths in cases where the disability is serious than in cases where it is minor, including measures to assist workers to maintain useful and satisfying lives.

7. Where the worker is suffering from a compensable injury or disease together with some other impediment to a return to work, rehabilitation assistance may sometimes be needed and provided to address the combined problems. Rehabilitation assistance should not be initiated or continued when the primary obstacle to a return to work is non-compensable.

The Royal Commission generally endorsed these guiding principles (on page 16 of its *Final Report*). I similarly generally endorse the above quoted mission and goal of VR services, as well as the three service objectives and seven guiding principles of quality vocational rehabilitation.

B. VR Services to disabled workers – should they be discretionary or mandatory?

As observed above, Section 16(1) provides the WCB with a very broad discretion with respect to the provision of VR services to disabled workers. BC is not unique in this approach. As noted on page 23 of the WCB's Briefing Paper:

> The legislative provisions related to VR in most Canadian jurisdictions offer a broad discretion.

The Royal Commission appeared to accept the continuation of the WCB's discretionary approach to providing VR services to disabled workers (as opposed to the dependants of deceased workers). After setting out Section 16 of the Act, the Royal Commission stated the following on page 14 of its *Final Report*:

> This section makes it clear that the board provides vocational rehabilitation services at its discretion. While this may be appropriate in the case of injured workers, the commission, in its *October 1997 Report* to government on Sections 2 and 3(a) of its terms of reference, recommended that in the case of surviving spouses and dependants:
>
> s.16(2) be amended to provide that, where such services have been requested and a need has been determined, 'the board shall make provisions and expenditures for the training or retraining of a surviving dependent spouse, regardless of the date of death'; and
>
> s.16(3) be amended to provide that, where such services have been requested and a need has been determined, the 'the board shall provide counselling and placement services to dependants'.

There are four areas where the WCB is required to exercise its broad discretionary authority:

(i) What VR services should be provided by the WCB?

(ii) Who should be eligible to receive any VR services from the WCB?

(iii) Which services provided by the WCB should any individual eligible worker receive?

(iv) What is the extent of the VR services to be provided to the eligible worker (in terms of cost and/or duration of the VR services provided)?

Each of these areas involves the consideration by the WCB of a variety of factors, and the exercise of considerable judgment in reaching a determination. Some of the factors in determining who should receive VR services, which services they should receive, and to what extent these VR services should be provided, include:

- the severity of the worker's disability arising from the compensable injury or occupational disease;
- the personal characteristics of the worker (ie: his/her age, educational background and language skills);
- the motivation and commitment of the worker in his/her own rehabilitation;
- the existence and impact of any non-compensable factors which may impede the worker's ability to return to work;
- the realistic probability that the worker will successfully complete the VR services provided; and
- the likelihood of job opportunities for the worker at the end of the VR services provided by the WCB.

Most of the above factors involve the exercise by the decision-maker of discretion and judgment. Someone must make the initial determination as to whether VR services would be of value to a particular worker and, if so, what is the nature and extent of the services to be provided. As noted in Section #86.00 of the Claims Manual, these determinations are currently made by the WCB's Vocational Rehabilitation Consultants (who are guided by the published policies of the WCB).

Decisions concerning the provision of VR services to disabled workers often involve difficult choices to be made, and can therefore be quite contentious. In my opinion, the WCB must retain the discretionary authority it currently has to determine what VR services are to be provided by the WCB, who will be eligible to receive any of the VR services provided by the WCB, and the nature and extent to which such services will be provided to any particular disabled worker.

Although the Royal Commission reached a similar conclusion (that it is appropriate for the WCB to provide VR services to injured workers at its discretion), it did note the following concern on page 21 of its *Final Report*:

> . . ., the discretionary power granted by the Act means that a lot is left to the vocational rehabilitation consultants' common sense; consequently, practice is not always consistent. This creates a potential for actual or perceived unfairness in providing services which cannot be verified or denied due to a lack of data.

In response to this concern (of lack of consistency), the Royal Commission recommended that the quality assurance mechanisms within the WCB's Vocational Rehabilitation Services Department (as well as throughout the WCB generally) had to be enhanced. I certainly concur with the Royal Commission's view on this point (and I note that "quality" is an issue which has been specifically raised in the Terms of Reference for the Core Review of the WCB's Service Delivery). However, it is also my opinion, as will be discussed below, that the *Act* must provide further direction to the WCB with respect to how its discretion in providing VR services should be exercised. Such statutory direction should lead to greater consistency being achieved in the individual determinations made by each of the WCB's Vocational Rehabilitation Consultants.

C. Statutory Principles

As noted above, the broad discretionary authority exercised by the WCB Vocational Rehabilitation Consultants on a case-by case basis has led to concerns regarding inconsistencies in decision-making and perceived unfairness. Setting out clear statutory principles or guidelines concerning the provision of VR services by the WCB to disabled workers would, in my opinion, assist in addressing these concerns. Such guidelines would clarify the statutory expectations in this area, and would be relied upon by the WCB in developing and implementing its published policies concerning such matters as the eligibility of disabled workers to receive VR services, and the timing, nature and extent of the VR services provided to disabled workers.

Accordingly, I am recommending that Section 16(1) of the *Act* be amended to provide statutory direction to the WCB with respect to the following four areas:

1. What should the WCB's focus be, as a general rule, with respect to the eligibility of disabled workers to receive VR services?

2. What should the objective of the WCB's VR services be – employment or employability?

3. The need for early intervention of VR services.

4. The need for mutual collaboration and cooperation between the WCB and the disabled worker with respect to the provision of VR services to that worker.

I will now elaborate upon each of the above four areas.

1. Eligibility of disabled workers for VR services

Although the WCB should retain the discretion to determine the eligibility of individual disabled workers to receive any VR services, the *Act* should provide some guidance with respect to what the WCB's overall focus for eligibility should be.

As noted previously, the goal of the VR services provided to a disabled worker is to maximize his/her long-term earnings capacity. In my opinion, the focus of the WCB, with respect to determining the eligibility of a disabled worker to receive any VR services, should be compatible with this goal. Accordingly, it is my recommendation that the *Act* enunciate the principle that VR services should be provided to those disabled workers whom the WCB determines require VR assistance in order to maximize their long-term earnings capacity, up to the level of the worker's pre-injury earnings (and subject to the maximum earnings level prescribed by the *Act*).

2. The objective of VR services

I was asked to address the following question in my Terms of Reference:

> Should the objective of vocational rehabilitation be employment or employability?

The starting point in response to this question is to define the terms of "employment" and "employability". For the purposes of this Report, I consider each of these terms to mean the following:

(i) Employment – The focus of the VR objective of employment is on the actual placement/return to work of the disabled worker to employment which maximizes his/her long-term earnings capacity, up to the level of the worker's pre-injury earnings. Pursuant to this objective, the WCB would continue to provide VR services to the worker until actual placement in employment is achieved.

(ii) Employability – The focus of this VR objective is on providing services to the disabled worker to enhance his/her employability. The emphasis is on the development of employable skills which the worker can utilize to maximize his/her long-term earning capacity – not on the actual placement of the worker in such employment. VR services would be provided until the WCB determined that it had gone as far as is reasonable in the circumstances to enhance the worker's employability for suitable and reasonably available employment in the long run which would maximize the worker's earnings capacity, up to the level of the worker's pre-injury earnings.

The published policies of the WCB identify five sequential phases in the VR process. Section #87.20 of the Claims Manual describes these five sequential phases as follows:

> Phase I – All efforts will be made to help the worker return to the same job with the same employer.
>
> Phase II – Where the worker cannot return to the same job, the employer will be encouraged to accommodate job modification or alternate in-service placement.
>
> Phase III – Where the employer is unable to accommodate the worker in any capacity, vocational exploration will progress to suitable occupational options in the same or in a related industrial sector, capitalizing on the worker's directly transferable skills.
>
> Phase IV – Where the worker is unable to return to alternate employment in the same or related industry, vocational exploration will progress to suitable occupational opportunities in all industries, recognizing the worker's inventory of transferable skills, aptitudes and interests.
>
> Phase V – Where existing skills are insufficient to restore the worker to suitable employment, the development of new occupational skills will be considered.

The Royal Commission generally endorsed the above five sequential phases of vocational rehabilitation. (See page 19 of the Royal Commission's *Final Report.*) In the July 7, 1997 Final Report prepared by H. Allan Hunt and Michael J. Leahy, entitled "*Vocational Rehabilitation: Policy and Practice at the WCB of British Columbia*", the authors described the focus of the WCB's five sequential phases of VR in the following manner (on page 39):

> The clear focus of vocational rehabilitation is: first, to return the injured worker to the pre-injury or other employer, in a different or modified job if necessary; and second, to seek to develop employability only when the first objective cannot be achieved. Thus, the primary goal is employment, with employability as a secondary goal when the primary goal cannot be achieved.

The objectives of employment and employability are not mutually exclusive from the perspective that the workers' compensation system in BC must adopt either one or the other. To the contrary, I view the two concepts as being interconnected blocks. The initial block consists of the first four phases of the WCB's VR process. The objective at this stage of the process is the placement of the worker in actual employment. Only when it is determined that this objective cannot be reasonably achieved does the second block come into play – the development of employable skills to enhance the worker's employability (ie: the fifth phase of the WCB's VR process). In my opinion, this interconnected relationship between the objectives of employment and employability is appropriate.

Nevertheless, there will be cases where the placement of a disabled worker into actual employment cannot be reasonably achieved. In such circumstances, the final objective of the VR services provided by the WCB must, in my opinion, remain employability. This would be consistent with the practice in most other Canadian jurisdictions, as noted on page 22 of the WCB's Briefing Paper:

> Most jurisdictions in Canada provide VR services or its equivalent to effect employment where possible but with an overall goal of employability with reference to pre-injury earning capacity and labour market demand.

The difficult issue which arises concerns the timing of the determination that the initial objective of placement in actual employment cannot be reasonably achieved. In my opinion, this is a decision which must be made by the WCB's Vocational Rehabilitation Consultant based on the individual circumstances of the disabled worker. Although such a determination may often be controversial, the WCB must have the authority to bring the VR services it provides to a disabled worker to an end. As noted by Mr. Justice Tysoe in his 1966 Report entitled "*Commission of Inquiry Workmen's Compensation Act*" (on page 172):

> The Board should not be expected to function as an employment agency for workmen, disabled or otherwise.

It is therefore my recommendation that the *Act* enunciate the following second principle with respect to the VR services provided by the WCB to disabled workers:

> The primary objective of the VR services provided to a disabled worker is to return him/her to actual employment with the pre-injury or another employer. In the event the WCB determines that this objective cannot be reasonably achieved, the final objective will be to seek to enhance the worker's employability for suitable and reasonably available employment which would maximize the worker's earnings capacity in the long run, up to the level of the worker's pre-injury earnings.

3. Early Intervention

One theme has been common in all of the documentation I have reviewed – VR services must be provided on a timely basis if the impact of the services on the disabled worker is to be effective. For example, Mr. Justice Tysoe stated the following on page 164 of his 1966 "*Commission of Inquiry*" Report:

> The earlier rehabilitative treatment can be commenced the better. An early start and continuity will either prevent ultimate disability entirely or, if that is not possible due to the nature of the injury, it will reduce its extent. This being so, it is wise to commence treatment as soon as the need for it is indicated.

Similar comments were raised by the most recent Royal Commission in its *Final Report*. The following was stated on page 11:

> It is becoming increasingly recognized that early intervention is an important factor in successful rehabilitation.

The Royal Commission returned to this topic on page 34:

> It is well established that workers who are disabled and away from work have a 50% chance of returning after a six-month absence; a 20% chance after a one-year absence, and only a 10% chance after two years' absence. As the 1997 National Institute of Disability Management and Research report *Strategies for Success* states:
>
> > For a disabled worker, the chances of finding a new job after a long-term absence are often grim. Early intervention and graduated or transitional work options are made possible by disability management programs, maintaining the connection to the workplace and facilitating successful return to work.
>
> "Timeliness and early coordination with medical and physical rehabilitation" is one of vocational rehabilitation's seven principles. The importance of timeliness is stressed in virtually every related document reviewed by the commission's researchers.

As referred to above by the Royal Commission, the first "guiding principle of quality vocational rehabilitation" (in Section #85.30 of the Claims Manual) calls for timely intervention:

> Vocational rehabilitation should be initiated without delay and proceed in conjunction with medical treatment and physical rehabilitation to restore the worker's capabilities as soon as possible.

However, as noted on page 3 of the WCB's Briefing Paper, VR services are not usually provided until the worker's impairment has stabilized:

> The statutory mandate of VR is to aid in getting injured workers back to work or to assist in lessening or removing the effects of a handicap. Board policies allow for VR interventions to take place in cases of both temporary and permanent disability. However, for the most part, VR is considered once a worker's medical impairment has stabilized and the worker is considered to have a permanent partial disability.

In my opinion, waiting for a disabled worker's condition to stabilize before VR services are provided by the WCB may, depending on the nature of the worker's impairment, be inconsistent with the principle of early intervention. There are numerous impairments suffered by workers which may require a significant period of time to elapse before the condition is determined by the WCB to have stabilized. For example, workers who suffer significant back injuries, which may require one or more surgical procedures, will often remain on temporary wage loss payments for an extended period of time. If effective VR services are to be provided to these workers, it must be done early in the process. To wait until the worker's back condition has stabilized (which may well exceed one or two years from the date of injury) defeats the value and effectiveness of quality VR.

Chronic pain is another example of an impairment which requires early detection and intervention. To wait until the worker's pain has become chronic will often significantly impede the effectiveness of the VR services provided to that worker. On this point, I refer to the following comments by Dr. T.J. Murray in his 1995 Report on "*Chronic Pain*" prepared for the Workers' Compensation Board of Nova Scotia (on pages 3 and 4 of the section entitled "Brief Summary of the Report"):

> An important key is early intervention in the process. This not only means early intervention in the development of chronic pain, but attention to how acute pain is treated so that it does not lead so often to chronic pain. In addition, early return to work despite pain is essential, as the likelihood of return to work and a full and active life becomes less likely as the months go by. When it is clear that early intervention is important, the further steps are based on a careful assessment of the problem at that point, coupled with assessment of vocational, psychological and social factors.

As noted by the Royal Commission in the excerpt reproduced above, the longer a disabled worker is away from work, the less likely is the chance of his/her returning to employment. In order to ensure that the WCB provides VR services in a timely and effective manner, it is my recommendation that the *Act* enunciate the following third principle – that early intervention is a necessary factor in the delivery by the WCB of effective VR services to disabled workers.

Finally, I encourage the WCB to develop an appropriate process to ensure that a disabled worker's need for quality VR services is detected and provided at an early stage of the compensation process. On this point, I have recommended that the Case Manager must review the worker's claim file, after the worker has been in receipt of temporary wage loss benefits for a period of 10 weeks from the date of injury, for the following two purposes:

(i) to determine the average earnings of the worker, and

(ii) to determine whether relief of costs should be granted to the affected employer pursuant to Section 39(1)(e) of the *Act*.

If the WCB Case Manager had not previously considered whether any VR services should be provided to the disabled worker, it is my recommendation that such consideration should be given as part of the Case Manager's overall 10 week review of the worker's claim file.

4. Mutual collaboration and cooperation

If the VR services provided to a disabled worker are to be successful, it is essential that there be mutual collaboration and cooperation between the WCB and the worker. This concept of mutual collaboration and cooperation is recognized in the following three guiding principles of quality vocational rehabilitation found in Section #85.30 of the Claims Manual:

- Successful vocational rehabilitation requires that workers be motivated to take an active interest and initiative in their own rehabilitation.

- Vocational rehabilitation is a collaborative process which requires the involvement and commitment of all concerned participants.

- Effective vocational rehabilitation recognizes workers' personal preferences and their accountability for independent vocational choices and outcomes.

This collaboration between the WCB Vocational Rehabilitation Consultant and the disabled worker is also recognized in Section #87.10 of the Claims Manual, which reads in part:

> While it is up to the Consultant to assess workers' needs and appropriate levels of rehabilitation assistance, it is ultimately the responsibility of workers to decide their own vocational future.

The WCB Vocational Rehabilitation Consultant and the disabled worker must work cooperatively in developing and implementing a VR plan that maximizes the long term earnings capacity of the worker, up to the level of the worker's pre-injury earnings (and subject to the maximum earnings level prescribed by the *Act*). It makes little sense for the Vocational Rehabilitation Consultant to develop a VR plan in which the worker has no interest. Similarly, the preferences of the worker cannot be the sole factor dictating the VR course to be followed by the Vocational Rehabilitation Consultant.

In the event the disabled worker fails to actively cooperate with and participate in the WCB's VR efforts, then no further VR services or benefits should be provided by the WCB to that worker. As noted by Mr. Justice Tysoe on page 169 of his 1966 *"Commission of Inquiry"* Report:

> It is, perhaps, unnecessary for me to say that unless a workman is well motivated and is prepared to cooperate, all the efforts of the Department on his behalf will be in vain.

Accordingly, I recommend that the *Act* enunciate a fourth principle underlining the necessity for mutual collaboration and cooperation between the WCB and the disabled worker if the WCB's VR efforts on behalf of the worker are to be successful.

D. Deeming

I previously addressed the concept of "deeming" in the "Pensions" section of this Report. As discussed in that section, deeming is the process by which the WCB determines the post-injury earnings that a permanently disabled worker is able to earn (in employment that the worker is not currently engaged, but which the WCB considers is suitable and reasonably available to the worker in the long run). I concluded that Section 23(3) of the *Act* required the deeming process to be used by the WCB when determining what a worker "is able to earn" in some suitable occupation after the injury. I therefore recommended that the deeming process must be retained for the purpose of assessing employability when calculating a loss of earnings pension pursuant to Section 23(3).

The Royal Commission also recognized that deeming is a necessary aspect of any loss of earnings compensation system. On page 25 of its *Final Report*, the Royal Commission noted that "deeming is a common practice in Canada". It then stated the following on pages 26 and 27:

> The commission notes that in order for the board to determine which method of determining loss-of-earnings capacity is "more equitable", some form of deeming must occur in all instances. The frequency and equity of that process is of some concern to the commission.

In my opinion, the most significant difficulty associated with the deeming process is that it is the Vocational Rehabilitation Consultant who performs the "Employability Assessment", with respect to a permanently disabled worker, as a service for Disability Awards (which will rely on the Assessment for the purpose of setting the worker's entitlement to a loss of earnings pension pursuant to Section 23(3) of the *Act*). In other words, the Vocational Rehabilitation Consultant conducts the Employability Assessment upon which the deeming process is based for pension purposes. On pages 42 to 44 of their 1997 Final Report on "*Vocational Rehabilitation*", Messrs. Hunt and Leahy described the difficulties associated with having the Vocational Rehabilitation Consultant perform the Employability Assessment to determine the worker's pension entitlement pursuant to Section 23(3) of the *Act*:

> A related issue, because they both emanate from the Employability Assessment performed by the Vocational Rehabilitation Consultant, is the "deeming" of jobs for permanent pension purposes. In those circumstances where the claimant has not returned to work at the time of fixing the permanent loss of earnings pension level, it is necessary to come up with an estimate of potential earnings. Otherwise, there would be no loss of earnings basis for setting permanent partial disability payments. There would only be the functional impairment as the basis of compensation. So the practice of deeming jobs has evolved in British Columbia, as it has in many other jurisdictions in North America.
>
> The problem is that deeming not only requires estimating the effects of the permanent impairment, but also the labour market implications of that impairment. Further, the VRC is required to assume that the "appropriate" vocational rehabilitation intervention has been completed, even where the injured worker is not cooperating with vocational rehabilitation efforts. In essence, the VRC is required to use his or her Employability Assessment, which should be the basis for a vocational rehabilitation plan designed to assist the worker in recovering from the effects of the disability, to determine the worker's permanent pension level. . . .
>
> . . . However, the fact remains that doing an Employability Assessment for the purpose of setting a permanent pension level puts the VRC in a difficult position.

> While the VRC tends to think of him or herself as an advocate for the injured worker, the use of the Employability Assessment in adjudication of the permanent pension creates a significant tension. The VRC must choose between: (1) aiming high for the claimant's recovery and rehabilitation goals; and (2) aiming low for the purpose of justifying a larger permanent pension. The artificial nature of this exercise to determine "suitable and available" jobs also creates considerable opportunity for differences of opinion. Fundamentally, it is the VRC's professional judgment that the claimant could complete the vocational rehabilitation plan and secure the deemed employment, but it is not a fact. Obviously, this is an area rife with opportunities for disputation.

In my opinion, the overall concern which arises form the above excerpt is that the deeming process ultimately becomes a substitute for VR services. Once the deeming process has been invoked, the focus for disabled workers shifts from participation in VR efforts to challenging the impact the deeming has on their pension entitlement. In an attempt to address this concern, one of the Royal Commission's recommendations (#35(b), in part, on page 29 of its *Final Report*) to the WCB was to "take appropriate measures to ensure that deeming . . . not be allowed as a substitute for appropriate vocational rehabilitation". With respect to the "appropriate measures" the WCB could take, the Royal Commission advised (on page 29) that the WCB "needs to examine how it might improve its guidelines around deeming, so that it becomes more of an objective process".

With respect to the development of such guidelines around deeming, I offer the WCB the following comments in regard to when the deeming process should, and should not, be used.

(i) As noted on page 24 of the WCB's September 24, 2001 Briefing Paper entitled "Permanent Partial Disability Pensions", deeming "is based on the notion of employability not employment".

Accordingly, the deeming process should never be utilized while the worker is actively participating in any of the first four sequential phases in the WCB's VR process. Since all of these phases are focused on returning the worker to actual employment (with either the pre-injury employer or another employer), it would be premature for the WCB to determine what the worker "is able to earn in some suitable employment" for the purpose of Section 23(3) of the Act. In other words, it makes little sense for the WCB to deem the employability of the worker for pension purposes when the VR services of the WCB are contemporaneously focused on returning the worker to actual employment.

(ii) The purpose of the fifth (and final) phase of the WCB's VR process is the development of new occupational skills for the worker (ie: to enhance the worker's employability) once the WCB determines that the placement of the worker into actual employment cannot reasonably be achieved. In my opinion, the WCB must first determine the level to which it has enhanced the worker's employability before it can reasonably finalize the long term employability prospects of the worker for deeming purposes. In other words, how can the WCB reasonably deem the worker employable in a suitable occupation for the purpose of Section 23(3) of the Act before the WCB's VR plan for enhancing the worker's level of employability has been developed and implemented?

(iii) The WCB's Briefing Paper on "Permanent Partial Disability Pensions" identified (on page 23) the following scenarios when the WCB would utilize the deeming process to determine what a worker "is able to earn" for the purpose of calculating his/her entitlement to a loss of earnings pension pursuant to Section 23(3):

1. A worker is assessed for permanent partial disability benefits, and
   - the worker has taken part in a Vocational Rehabilitation ("VR") program such as formal training;
   - the worker is considered to be employable but does not have a job;
   - the worker has a job but at reduced earnings;
   - the worker has for personal reasons, withdrawn from the labour force; or
   - the worker fails to cooperate with the VR process.
2. A worker is waiting for a permanent partial disability pension assessment and is being considered for income continuity benefits, and
   - the worker has retired;
   - the worker is experiencing non-compensable medical, psycho-social or financial problems that preclude active participation in the rehabilitation process; or
   - the worker refuses to actively participate in the rehabilitation process.

In my opinion, the above circumstances (as to when deeming will be utilized by the WCB) are reasonable and appropriate. However, with respect to the second "bullet" in the first scenario (ie: the worker is considered to be employable but does not have a job), I reiterate the point raised above – the deeming process should not be utilized until the WCB can determine the level to which the worker's employable skills have been developed through the VR process.

As a final comment concerning the process of deeming, I agree with the following conclusion reached by Messrs. Hunt and Leahy on page 45 of their 1997 Final Report on "*Vocational Rehabilitation*":

> In sum, deeming is inaccurate, impersonal, and overly demanding of professional judgment from the VRC. It is highly dependent on subjective interpretations of suitability and availability of employment and the capability of the injured worker. However, it also makes the dual pension entitlement system feasible, and much

like workers' compensation as a whole, constitutes a system of administrative justice that is somewhat imprecise, but reasonably effective and economical to administer.

E. Relocation

A difficult issue arises with respect to whether the WCB can require a disabled worker to relocate for the purpose of obtaining employment. If the WCB does have such authority, what impact should the worker's refusal to relocate have on his/her entitlement to a loss of earnings pension?

The WCB's existing published policy, with respect to this relocation issue, is set out in Section #40.12 of the Claims Manual:

> A reasonably available job must be one that is within a reasonable commuting distance of the worker's home. Where there is no available job within that commuting distance that the worker could reasonably be expected to undertake, the worker might be expected to relocate, depending on age, the availability of a suitable job elsewhere, and other factors; but relocation will not normally be expected unless the worker is offered the expenses of relocation, either by the Canada Employment and Immigration Commission or by the Board or by some other government agency.

There is no simple answer to the question concerning the WCB's authority to require a disabled worker to relocate in order to maximize his/her long term earnings capacity for the purpose of determining the worker's entitlement to a loss of earnings pension pursuant to Section 23(3) of the *Act*. Instead, the issue to be addressed in each case is whether it would be reasonable for the WCB to require the worker to relocate based upon a full consideration of all of the worker's individual circumstances. Factors that may need to be considered by the WCB would include:

(i) The severity of the worker's permanent disability.

(ii) The level of medical and related assistance received by the worker within the community in which he/she currently resides, and the worker's need to continue to receive such assistance in the future.

(iii) The age of the worker.

(iv) The potential impact on the worker's emotional/psychological condition if he/she is required to relocate. If the support system relied upon by the worker (ie: family, friends, community involvement) is provided from within the community in which he/she currently resides, will it be in the best interests of the worker, from an overall VR perspective, to require the worker to relocate?

(v) The worker's attachment to his/her community, including the impact on family members of the worker who would be affected by the worker's relocation. For example, does the spouse of the disabled worker have a job in the community?

(vi) The nature of the economy in the community/region in which the worker currently resides. For example, the worker may reside in a rural community whose economy is dependent on a large resource based Employer (by whom the worker is employed). If that Employer permanently ceased its operations for economic reasons, would the worker, had he/she not been permanently disabled, likely have been required to relocate to find alternate employment?

(vii) Did the worker have a pattern of relocating for employment purposes prior to suffering the permanent disability?

(viii) What is the distance that the worker is being required to relocate. Is it within reasonable commuting distance from his/her current location; is it within the region in which the worker currently resides; is it across the Province?

(ix) What is the availability and expected duration of the employment in the other community to which the worker is being requested to relocate?

(x) What are the anticipated earnings the worker will receive in the employment in the other community? Do such earnings reasonably maximize the long term earnings capacity of the worker?

If, after fully considering all of the applicable factors, the WCB determines that it is reasonable for the disabled worker to relocate in order to obtain alternate employment, it is my opinion that the WCB must have the authority to require the worker to do so. If the worker refuses to relocate in such circumstances, then the WCB would be entitled to base the level of the worker's loss of earnings pension (pursuant to Section 23(3)) as if the worker had relocated in order to obtain the alternate employment. In other words, the worker would be deemed to have accepted the relocated employment for the purpose of determining his/her loss of earnings pension entitlement.

Notwithstanding the above, there are several other general comments I want to raise with respect to the exercising of the WCB's authority to require a disabled worker to relocate for the purpose of obtaining alternate employment. **First**, one cannot disregard the potential devastating effect a significant permanent impairment may have on the worker's life. As observed by the Royal Commission on page 11 of its *Final Report*:

> The human costs of disability can be substantial. These can include loss of self worth, marital and family stress, financial strain, and depression.

The worker's attachment to his/her community may be one of the few remaining focal points for stability and continuity subsequent to suffering the permanent disability. In my opinion, the WCB must proceed cautiously when considering the merits of disrupting the worker's ties to his/her current community.

Second, the WCB should only require the disabled worker to relocate from his/her current community when

(i) all reasonable options regarding suitable alternate employment opportunities, which are within a reasonable commuting distance from the worker's home, have been exhausted; and

(ii) there is a substantial likelihood that the worker will obtain alternate employment, which will maximize his/her long term earnings capacity, within a reasonable time frame from the date of the worker's relocation. In my opinion, it makes little sense to significantly disrupt the worker's life, by requiring him/ her to relocate to another community against his/her wishes, if there is not a substantial likelihood that the worker will obtain such alternate employment.

Third, the WCB should retain its existing published policy that relocation will not normally be expected unless the worker is offered the expenses of relocation by the WCB or some other government agency.

F. Scope of review with respect to VR decisions

As I have previously noted in my discussion of "Average Earnings" (in the "Benefits" section of this Report), I have a concern which arises when an initial decision-maker is provided with a broad discretion under the *Act*; he/she exercises that discretion in good faith and pursuant to the applicable published policies of the WCB; and he/she is thereafter subject to being overturned on appeal not because his/her discretion was wrongly exercised, but because a subsequent decision-maker exercises his/her own judgment differently. I identified two alternatives which I perceived were available to address this concern. The broad discretion provided under the *Act* could be narrowed, or the scope of review upon appeal from the initial decision-maker's determination could be limited. In the case of the determination of average earnings, I recommended the adoption of the first alternative.

With respect to the VR determinations made by the WCB, I do not believe it would be appropriate to narrow the discretion exercised by the Vocational Rehabilitation Consultants (for the reasons I had previously discussed under the heading "VR Services to disabled workers – should they be discretionary or mandatory?"). Accordingly, it is my opinion that the scope of review by subsequent decision-makers must be limited.

I therefore recommend that the *Act* be revised as follows:

(i) The scope of review should be limited, pursuant to points (ii) and (iii) below, with respect to any VR decision made by the WCB, including

   (a) who is eligible to receive any VR services or expenditures from the WCB,

(b) which VR services provided by the WCB should any individual disabled worker receive, and

(c) the extent of any VR services or expenditures provided by the WCB to any individual disabled worker.

(ii) Any application for internal review, with respect to any VR determination, must be based on the following grounds of review:

(a) error of fact which had a substantial and material impact on the decision reached by the initial decision-maker, or

(b) error of law, or

(c) contravention of a published policy of the Board of Directors.

(iii) The decision rendered by the internal review process, with respect to any VR determination, shall be final and conclusive. No further appeal can be brought from the internal review process to the external Appeal Tribunal.

By way of clarification, I want to emphasize that the above recommendations (limiting the scope of review of VR determinations) would not apply to any "deeming" determination made by the WCB. Deeming decisions relate directly to the worker's level of entitlement to a loss of earnings pension under Section 23(3) of the Act. Accordingly, any deeming determinations would be subject to the broader substitutional standard of review at both the internal review and the external Appeal Tribunal levels.

G. Mandatory Re-employment

My Terms of Reference raised the following questions:

> Should there be a statutorily mandated duty upon employers to accommodate injured workers? If so, should the nature of the duty vary depending upon the size of the employer and/or industry?

The Royal Commission addressed this issue in Volume II, Chapter 1 of its *Final Report* (entitled "The Adequacy of Benefits"), on pages 43 to 50. The Royal Commission concluded that the Workers Compensation Act should be amended to include a statutory re-employment provision. The following excerpts from pages 43 to 46 elaborate upon the rationale for the Royal Commission's conclusion:

> The commission believes that prolonged absences from work due to injury or illness place the injured worker at a significant disadvantage in returning to work. This is beyond the disadvantages directly arising from the injury or illness itself. The commission also believes that, while vocational rehabilitation efforts on the part of the board are essential, they would be enhanced by measures directing

the workplace parties, wherever possible, to sustain the injured worker's employment with the time-of-injury employer.

. . .

In order to ensure that injured workers have some protection from job loss due to injury, and a fair opportunity to recapture both the monetary and non-monetary returns from work with their time-of-injury employer, the commission endorses a statutory re-employment provision. For those workers who suffer permanent disabilities as a result of work-related injury or disease, a statutory re-employment provision reinforces the hierarchy of vocational rehabilitation objectives, which ranks return to the time-of-injury job or another suitable job with the time-of-injury employer as the optimal return-to-work goal.

Further, there should be an accompanying duty to reasonably accommodate workers to enable them to perform the functions of the job, so long as providing the necessary accommodation does not impose undue hardship on the employer. The language and effect of such statutory obligations should reflect developments in relevant jurisprudence in the area of human rights law.

Submissions made to the commission by the employer community pointed out that much in the way of duties to accommodate already exist in the human rights field and that, therefore, it should not be necessary to codify these obligations in the Workers Compensation Act. The commission disagrees and considers codification necessary to make clear the exact nature of the obligations, upon whom they fall and the consequences of non-compliance. The board is charged with the statutory obligation to facilitate return to employment for injured workers and is also the agency best positioned to administer the recommendations outlined below, and to undertake the necessary adjudication regarding issues such as undue hardship, whether the level of accommodation is reasonable, and whether a worker is fulfilling the duty to mitigate losses arising from injury in connection with the re-employment process.

. . .

It should be noted that while any obligation to re-employ an injured worker is essentially an employer's obligation, it is not necessarily the case with respect to the obligation of making accommodations in that workplace. The commission believes that this duty to accommodate in the workplace, while falling primarily on the employer, cannot always be effectively implemented by the employer acting alone. It is a multi-party obligation that also requires, not merely the active cooperation of the injured worker, but also, in many instances, the co-operation of co-workers. . . .

It is clear that the employer's obligation to re-employ and the obligation to accommodate an injured worker must be subject to reasonable limits. Human rights law generally recognizes that this obligation does not extend to situations where it would impose "undue hardship" on the workplace parties. . . .

In a similar vein, the commission heard concerns expressed that injured workers may return to work and be placed in "phantom jobs" that are created simply to satisfy the statutory obligation. Soon after, these jobs might be eliminated because they serve no real business function, and the injured worker summarily dismissed. Such an occurrence would obviously be contrary to the spirit of what the commission is recommending. The injured worker should be returned to meaningful work, and the necessary accommodations made to enable the worker to fully participate in this work. The commission therefore believes that the injured worker should be afforded some protection from dismissal, except for bona fide business reasons, for a period of time following the date of the injury. Since the commission believes that the injured workers most vulnerable to a "phantom jobs" phenomenon will be those workers who are not able to return to their time-of-injury job, such workers require extra protection.

The commission does not believe that all employers have the same capacity to re-employ injured workers. Very small employers are less likely than larger employers to have the financial capacity or sufficient alternative employment opportunities to make these re-employment and reasonable accommodation provisions viable. As such, and consistent with the earlier Occupational Health and Safety (OHS) recommendations, the commission believes that employers with fewer than 20 workers should be relieved of these obligations.

The above discussion led the Royal Commission to its Recommendation #137 (on pages 48 and 49). For the purposes of my discussion, I refer to the following paragraphs of Recommendation #137:

> The Workers Compensation Act be amended to state that:
>
> a) employers with 20 or more workers be required to re-employ injured workers for a period of up to two years following the date of the injury, if the worker has at least one year of tenure with the employer prior to the injury;
>
> . . .
>
> c) an injured worker who meets the *bona fide* occupational requirements of the time-of-injury position is entitled to be re-employed in that position, or one comparable to it, on notice from the board;
>
> d) a worker suffering residual impairment due to the work injury that prevents the worker from returning to the time of injury position, but who meets the *bona fide* occupational requirements of another available position with the time of injury employer, is entitled to the first consideration to be hired to that position;
>
> e) in all cases where the injured worker is returning to the pre-injury employer, the employer and other workers be obliged to accommodate the worker so that the worker can perform the time-of-injury position, or a suitable alternative position;

f) the employer and workers be relieved of the obligations to accommodate the injured worker where such accommodation imposes undue hardship on the employer or other workers;

g) the factors to be considered in the assessment of undue hardship should be set out in the Workers Compensation Act;

. . .

I note that there was a dissenting opinion with respect to Recommendation #137(a). The dissenting Commissioner did not support the recommendation to impose the duty of mandatory re-employment on smaller employers. However, there is no indication where the dissenting Commissioner would draw the line between smaller and larger employers.

The Royal Commission makes a compelling argument for the inclusion of a mandatory re-employment provision within the *Act*. Furthermore, several other Canadian jurisdictions have adopted the concept of mandatory re-employment within their respective workers' compensation statutes.

Nevertheless, I am quite reluctant to make such a recommendation. My reluctance is not based on any disagreement with the concept of mandatory re-employment. To the contrary, I share the view that the pre-injury employer must have the primary responsibility for the re-employment of its disabled employee.

My reluctance instead arises from the fact that all of these concepts (mandatory re-employment of a disabled employee; the employer's duty to accommodate; and the standard of undue hardship) are already part of the law of the land – through the legislation and jurisprudence of the BC human rights regime. To expressly incorporate the same concepts within the BC workers' compensation system would result in duplication and, in my opinion, inconsistencies between the two regimes.

The WCB's Briefing Paper on "Vocational Rehabilitation" summarizes the role of the human rights regime, with respect to the concept of mandatory re-employment of disabled employees, on page 11:

> On the issue of accommodation, the *Canadian Charter of Rights and Freedoms* prohibits discrimination on the basis of physical disability. In BC, the *Human Rights Code* prohibits discrimination in employment based on a prohibited ground including physical or mental disability, without a bona fide occupational requirement. Implicit in this is that employers are required to accommodate as much as reasonably possible the characteristics of individual employees when setting workplace standards, thus bringing the duty to accommodate into the bona fide occupational requirement. Case law underscores the duty to accommodate as being ongoing.

The Royal Commission also recognized the necessity to integrate the human rights jurisprudence within the workers' compensation system. As quoted above, the Royal Commission's discussion included the following observation (on page 45):

> The language and effect of such statutory obligations (within the Workers Compensation Act) should reflect developments in relevant jurisprudence in the area of human rights law.

My concern arises from the fact that there will be an overlap of jurisdiction between the two regimes. I have no doubt that a divergence of views will develop between the areas of human rights and workers' compensation concerning how concepts such as "duty to accommodate" and "undue hardship" should be interpreted and applied with respect to mandatory re-employment of disabled employees. Such divergence will, in my opinion, lead to frustrations, uncertainties and controversies for the participants within the BC workers' compensation system.

My concern is highlighted by a number of aspects of the Royal Commission's recommendation which, if accepted, would require the involvement of both the human rights and workers' compensation administrative/adjudicative processes in determining when and how the concept of the mandatory re-employment of disabled workers should be interpreted and applied in BC. In particular, I refer to the following three aspects of the Royal Commission's recommendation:

(i) The mandatory re-employment obligation would only apply to employers with 20 or more workers. (Distinguishing the application of this obligation based upon the size of the employer's workforce is a common feature of similar statutory provisions found in other Canadian jurisdictions.) However, no such distinction is found in the area of human rights. Instead, each particular case would be considered based upon its own circumstances in order to determine if the employer met its obligations pursuant to the human rights legislation and jurisprudence.

By way of example, assume there are two competing employers in the same industry. Employer A has 21 workers covered under the *Workers Compensation Act*; while Employer B has 19 workers. A worker of each Employer suffers a significant back injury, and wants to return to work in some capacity with the pre-injury Employer. In both cases, Employers A and B assert they are unable to accommodate the return to work of their disabled workers without incurring undue hardship.

In these circumstances, Employer A's obligation to mandatorily re-employ its disabled worker would be adjudicated within the workers' compensation system. However, the disabled worker for Employer B would need to initiate a complaint within the human rights regime, since the mandatory re-employment provisions in the *Workers Compensation Act* would have no application to Employer B. As a result, the same issues that are addressed by the workers' compensation system with respect to Employer A would be determined by the human rights regime for Employer B.

(ii) The duty of mandatory re-employment would only be applicable to a disabled worker who has at least one year of tenure with the employer prior to the injury. (Once again, this is a very common feature in the workers' compensation legislation in other Canadian jurisdictions.) This distinction, based upon the disabled worker's length of employment, does not exist in the area of human rights.

Accordingly, the same dichotomy of jurisdiction would arise in the case of a disabled worker with more than one year of employment, who wants to return to work in some capacity with his/her pre-injury employer, and that of a disabled worker with less than one year of tenure with his/her employer. The workers' compensation system would apply to the former scenario, while the human rights regime would apply to the latter.

(iii) The obligation for the employer to mandatorily re-employ a disabled worker would only last for a period of up to two years following the date of the injury. (A similar qualification on the period of time the employer's obligation will continue is contained in the workers' compensation legislation of other Canadian jurisdictions.) However, an employer's similar obligation under the human rights regime does not cease at any specified time. Accordingly, the workers' compensation system would consider the complaint of a disabled worker whose employment was terminated prior to the expiry of the two year period; while a similar complaint brought by a disabled worker, who was terminated subsequent to this two year period, would be dealt with under the human rights regime.

It is my recommendation that the *Workers Compensation Act* not be amended to include mandatory re-employment provisions as recommended by the Royal Commission. Instead, I believe that the primary responsibility for the administration and adjudication of an employer's obligation to mandatorily re-employ a disabled worker should remain within the human rights regime.

Two concerns have been raised with respect to my recommendation to retain the status quo on this issue.

(i) The WCB – not the Human Rights Commission – is the agency best positioned to address the concept of mandatory re-employment, insofar as it applies to an employer's duty to accommodate a disabled worker, up to the standard of undue hardship, for return to work purposes.

(ii) A disabled worker would have to initiate a complaint within the human rights regime in order to address any issues arising from the failure or refusal on the part of the pre-injury employer to accommodate the worker's return to work. There are concerns surrounding the timeliness and effectiveness of requiring a disabled worker to follow this procedure.

I do acknowledge that there is some validity with respect to both of these concerns. However, in my opinion they are process-oriented concerns. The potential resolution of these concerns does not lie in the duplication of substantive administrative/adjudicative processes within both the workers' compensation and the human rights regimes.

In my opinion, the resolution of these concerns requires the workers' compensation and the human rights regimes to administratively work on a more co-operative basis with each other. For example, the WCB Vocational Rehabilitation Consultants must be aware of the human rights obligations on employers, disabled workers and other workplace participants in accommodating the return to work of a disabled worker. Mandatory re-employment is currently not a matter of choice for employers in BC – human rights legislation and jurisprudence require employers to accommodate the return to work of their disabled employees (whether the disabilities arise from occupational or non-occupational factors), up to the standard of undue hardship.

Similarly, Human Rights Officers must be willing to work with workers' compensation representatives to ensure that any issues arising from an employer's obligation to mandatorily re-employ a worker, who has suffered a disability due to an occupational injury or disease, are resolved in a consistent and timely manner. A process which will not ultimately resolve the disabled worker's complaint for an extended period of time will be counter-productive to the workers' compensation VR objectives of early intervention and return to actual employment.

It is my understanding that the Government's Administrative Justice Project is conducting a review of the human rights regime in BC. I anticipate that any concerns, with respect to the timeliness and effectiveness of the existing human rights system, will be identified and addressed through this review.

As part of the overall reviews of the workers' compensation and the human rights systems, the two agencies must be encouraged to work co-operatively in order to coordinate and integrate their overlapping interests with respect to the concept of the mandatory re-employment of a disabled worker. If, over time, experience ultimately demonstrates that the VR primary objective (of the disabled worker's return to work in some capacity with the pre-injury employer) cannot be reasonably achieved without a statutory mandate, then the Government may well have to revisit the issue of the appropriateness of including mandatory re-employment provisions within the *Workers Compensation Act*.

H. A Disabled Worker's Duty to Mitigate

The following issue was raised in my Terms of Reference:

> Should there be a statutory duty placed on workers to take all reasonable steps to mitigate any losses and return to work?

The Royal Commission believed that the *Act* should contain a provision which would oblige the disabled worker to take all reasonable steps to mitigate his/her loss arising from the compensable disability. The Royal Commission stated the following on page 47 of Volume II, Chapter 1 ("The Adequacy of Benefits") of its *Final Report*:

> Insofar as the duty to accommodate also relies on the participation of the injured worker, the obligation on that worker to mitigate his or her loss and to co-operate in the re-employment and accommodation process must also be legislatively affirmed, backed up by significant consequences for non-participation in order to encourage meaningful participation. The evaluation of the extent of the worker's obligation will also vary from case to case and require a weighing of all relevant

> circumstances. The commission recognizes that the worker may not always be able to return to the job performed prior to the injury. That may not be possible for a variety of reasons, including safety considerations relating to that worker or co-workers and/or undue hardship considerations. However, the worker should not be expected to assume a new job which is demeaning and designed primarily to enable the employer to meet the letter, but not the spirit, of the re-employment obligation in an effort to reduce claims costs.

The above discussion led to Royal Commission Recommendation #137(j) (found on page 49 of its *Final Report*):

> The Workers Compensation Act be amended to state that:
>
> . . .
>
> (j) for any interval where a worker fails to co-operate with or participate in the re-employment process, the board shall be entitled to reduce or suspend benefits otherwise payable under the Workers Compensation Act.

It is my recommendation that the *Act* should not be amended to specifically place a duty to mitigate on disabled workers. I have two primary reasons upon which I base this recommendation.

First, as noted on page 14 of the WCB Briefing Paper (on "Vocational Rehabilitation"), the concept of a worker's duty to mitigate is closely associated with an employer's duty to accommodate:

> A worker's duty to mitigate his or her loss of earnings is closely associated with an employer's duty to accommodate. It is understood that a worker must actively participate with the union and employer in arranging an appropriate accommodation. In a 1992 decision the Supreme Court of Canada discussed the worker's duty to cooperate in the context of a human rights complaint that the employer had failed to fulfill its duty to accommodate.
>
> The Supreme Court noted:
>
> > Where an employer has initiated a proposal that is reasonable and would, if implemented, fulfill the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. . . . The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

The employer's duty to accommodate and the worker's duty to mitigate are both concepts which originate from human rights legislation and jurisprudence. For the reasons which I discussed in the previous part of this section (with respect to why I would not recommend incorporating the human rights concepts of "duty to accommodate" and "undue hardship" into the workers' compensation legislation), I similarly do not believe the related concept of a disabled worker's duty to mitigate should be expressly set out in the *Act*.

Second, it is my opinion that the WCB already has sufficient authority to "penalize" a disabled worker who fails to co-operate with or participate in the WCB's VR efforts being made on behalf of the worker. In particular, I refer to the following three consequences which may arise if a disabled worker fails to co-operate with the VR efforts of the WCB.

(i) A disabled worker who fails to actively co-operate with and participate in the WCB's VR efforts would no longer be eligible to receive any VR services or benefits from the WCB.

(ii) The disabled worker's failure to co-operate with the WCB's VR efforts would result in the WCB activating its deeming process for the purpose of assessing the worker's entitlement to a loss of earnings pension pursuant to Section 23(3) of the *Act*.

(iii) The disabled worker's failure to co-operate with the WCB's VR efforts would result in the WCB taking the appropriate steps (as discussed in Sections #89.11 and 89.12 of the Claims Manual) to adjust any continuity of income payments the worker may be receiving. (Income continuity payments are essentially "bridging" payments provided by the WCB to a disabled worker whose compensable disability has stabilized and who is awaiting the assessment and implementation of his/her permanent pension award entitlement.)

I do not perceive what additional authority the WCB would require in order to effectively deal with a disabled worker who failed to co-operate with the WCB's VR efforts. For example, it would not be appropriate, in my opinion, for the WCB to reduce or suspend any loss of function pension entitlement which the disabled worker has pursuant to Section 23(1) of the *Act*. As discussed elsewhere in this Report (in the section entitled "Pensions"), the intent of the loss of function pension award is to compensate the worker for the presumed impairment to his/her earnings capacity based upon the "nature and degree of the injury". Every disabled worker who suffers a similar permanent compensable disability would therefore be entitled to receive a similar loss of function pension award – regardless as to whether the worker returned to his/her pre-injury or some other employment; was unable to return to any employment; or failed to co-operate with the WCB's VR efforts to return him/her to employment.

I. Sections 16(2) and (3) of the Act

Pursuant to Sections 16(2) and (3) of the *Act*, the WCB has the discretionary authority to provide the specified vocational rehabilitation services to dependants of a deceased worker.

The Royal Commission considered Sections 16(2) and (3) on page 166 of its 1997 *Interim Report*. The Royal Commission believed that where a surviving dependent spouse or surviving dependants require the services specified in the existing provisions, then such services must be provided by the WCB. Accordingly, the Royal Commission recommended that the WCB's discretionary authority pursuant to Sections 16(2) and (3) be made mandatory.

With respect, I disagree with the Royal Commission's recommendation. I previously considered the WCB's discretionary authority with respect to the provision of VR services to disabled workers pursuant to Section 16(1). I concluded that the WCB must retain its discretionary authority in providing such services.

With respect to the provision of VR services to surviving dependants of a deceased worker, the WCB will still be required to determine who will be eligible to receive the services, as well as the nature and extent of the services to be provided. The same reasoning, which led to my conclusion in regard to Section 16(1), applies equally to Sections 16(2) and (3).

Accordingly, it is my recommendation that:

(i) no changes be made to the discretionary authority provided to the WCB in Sections 16(2) and (3) of the *Act*; and

(ii) the scope of review, with respect to any VR decision made by the WCB concerning the eligibility, nature and extent of VR services provided to surviving dependants pursuant to Sections 16(2) and (3), should be limited in the same manner as previously recommended in regard to VR services provided to disabled workers pursuant to Section 16(1).

There is one final comment I wish to raise with respect to the counselling services provided by the WCB pursuant to Section 16(3) of the *Act*. I have been advised by the WCB that it offers grief counselling on every fatality claim for both surviving spouses and dependants. However, this practice is not currently reflected in the published policies of the WCB. To the contrary, Section #91.20 of the Claims Manual states that Section 16(3) permits the WCB to provide counselling services when the WCB considers it advisable to do so.

It is my recommendation that the WCB revise Section #91.20 of the Claims Manual to reflect the WCB's practice of offering grief counselling services to surviving spouses and dependants in every fatality claim.

A. Overview

I was requested to address the following questions in my Terms of Reference:

(a) Should there be provisions for redistribution of claims costs above a certain threshold?

(b) Are the current relief of costs provisions contained in the *Act* and in Board policy meeting their intended objectives? Are these objectives still valid? Should the relief of cost provisions be continued or should alternative mechanisms be implemented? If so, what mechanisms and why?

(c) Should the WCB have additional powers to combat fraud within the system? If so, what should these powers be?

As I noted in the "Introduction" section of this Report, practically all of my efforts during the past 5½ months were concentrated on the issues related to governance, the appellate structure, and the compensation aspect of the workers' compensation system. As a result, little time was left for the issues associated with the funding of the system to be fully canvassed.

Nevertheless, I was able to address the issue of relief of costs pursuant to Section 39(1)(e) in some detail. This discussion is found in the next part of this section. However, other than raising some general comments in the last part of this section, I have not had the opportunity to consider the remaining issues raised in my Terms of Reference as set out above.

B. Relief of Costs pursuant to Section 39(1)(e) of the *Act*

For the purpose of creating and maintaining an adequate Accident Fund, Section 39(1)(e) of the *Act* requires the WCB to "provide and maintain a reserve for payment of that portion of the disability enhanced by reason of a pre-existing disease, condition or disability".

Relief of costs pursuant to Section 39(1)(e) will be provided to an affected employer in those situations where a worker suffers a compensable injury or occupational disease, and there is evidence which indicates that the worker's recovery period was prolonged, or his/her permanent disability was enhanced, by reason of a pre-existing disease, condition or disability. With respect to the relief of costs in a claim involving a temporary total or temporary partial disability, the published policy of the WCB (as set out in Section #114.40 of the Claims Manual) is:

> . . ., no consideration will be given to the application of Section 39(1)(e) until the claimant has been temporarily disabled for a minimum period of 13 weeks

> following the injury. All of the costs of a claim cannot be charged under Section 39(1)(e).

The existing published policy requires the mandatory consideration of Section 39(1)(e) by the WCB on claims exceeding 13 weeks of disability. Section #114.43 of the Claims Manual states:

> The Claims Adjudicator, Disability Awards Officer or Adjudicator in Disability Awards have the responsibility to initiate consideration with or without a specific request or application by an employer, and to decide upon the applicability of the subsection on a claim.

Any costs that are relieved pursuant to Section 39(1)(e) are excluded from the determination of the employer's experience rated assessment. (See page 2 of Policy #30:50:52 of the WCB's Assessment Policy Manual.) These "relieved" costs are allocated to the reserve created pursuant to Section 39(1)(e) of the *Act*, and are spread over the entire Accident Fund. In effect, these costs become the responsibility of all rate groups in proportion to their payroll.

The Royal Commission considered Section 39(1)(e) in Volume II, Chapter 9 (entitled "Funding") of its *Final Report* (on pages 8 and 9). The Royal Commission concluded that Section 39(1)(e) should be maintained. It based its conclusion on the principle of "employer equity". On this point, the Royal Commission stated the following (on page 8):

> However the commission believes that this section of the Act also addresses another important principle: employer equity. While the section ensures that injured workers suffering from enhanced disability attributable to a pre-existing disease, condition or disability are fully compensated, it also ensures that the additional cost associated with that compensation is not visited directly upon the worker's employer.

1. Should relief of costs pursuant to Section 39(1)(e) be retained?

In my opinion, relief of costs pursuant to Section 39(1)(e) are inherently tied to the experience rating system adopted by the WCB. As noted in Policy No. 30:50:41 of the WCB's Assessment Policy Manual the experience rated assessment of an employer is derived from its claims costs:

> . . .
>
> 3. ER adjustments are based solely on claims costs. Costs used for the purpose of experience rating are costs directly associated with compensation claims, including the capitalized value of pensions awarded. The cost used for fatal claims will be the five-year moving Board-wide average cost of fatal claims rather than the actual cost of each claim.
>
> . . .

5. The plan uses the claims costs experience on a 3 year window of claims to calculate each firm's ER adjustment. This includes all costs of those claims up to the calculation date in the year following the most recent year of claims.

   For example, the 2000 rating uses the costs of claims which occurred in 1996, 1997 and 1998, along with the amounts paid on those claims between 1 January 1999 and 30 June 1999 (the calculation date for the 2000 ER adjustment).

6. The costs within the ER window are subject to maximum limits for an individual claim as follows: 100% of the first $70,000 of costs on a claim will be included; 50% of the next $50,000 of costs on the claim will be included; and 10% of all costs above $120,000 on the claim will be included in calculating the employer's ER adjustment.

7. To calculate the ER adjustment, the employer's performance in the three year window is averaged as follows: the employer's performance in the most recent year is weighted at 50%, in the prior year at 33.3%, and in the most distant year in the ER window at 16.7%. An employer's performance is its "cost to assessable payroll ratio".

8. In determining an employer's experience rating, the employer's "cost to assessable payroll ratio" is compared to the "cost to assessable payroll ratio" of the rate group to which the employer is assigned.

. . .

So long as the WCB retains an experience rating system (upon which the actual assessment rate of the employer will be based), there must be a mechanism in place which provides the WCB with the authority to determine which claims costs will, and will not, be considered in calculating the experience rated assessments of employers. For example, assume an employee suffers a back injury at work from which he would normally be expected to recover within a period of 2 to 4 weeks. However, due to the worker's latent degenerative disc disease, his recovery period is substantially prolonged. Furthermore, the worker will now suffer a permanent back impairment due to the aggravation the work injury had on his latent degenerative condition.

Since the worker's pre-existing degenerative condition was latent (ie: he did not suffer from any back complaints prior to the work injury), the WCB will provide the worker with full temporary wage loss benefits, and a pension for his permanent disability. If not for Section 39(1)(e) relief of costs, all of these claims costs would be charged to the affected employer, and could potentially have a very significant impact on the employer's experience rated assessment.

However, Section 39(1)(e) provides the employer with relief from the claims costs attributed to the impact the worker's pre-existing degenerative condition had on prolonging his recovery period, and on causing the worker to suffer a permanent disability in his back. Accordingly, the claims costs allocated to the employer, for the purposes of determining its experience rated assessment, are only those which are related to the worker's injury itself. As observed by the Royal Commission, Section 39(1)(e) must be retained to ensure "equity" between employers.

A number of criticisms have been raised with respect to the retention of Section 39(1(e). **First**, a concern has been raised about the significant efforts expended by the WCB in adjudicating and administering relief of costs pursuant to this provision. In the WCB's Briefing Paper dated September 24, 2001 entitled "Funding Issues", Section 39(1)(e) is considered in "Part A – Cost Transfers" (on pages 2 to 7). On page 4, the Briefing Paper described the concern associated with the WCB's adjudication and administration of Section 39(1)(e):

> Even if relief does increase equity, that increase must be balanced against the cost of providing it. In 2000, the historical project made about 14,000 decisions, of which about 600 resulted in relief being granted. It is estimated that the various Divisions spent $1.7 million on administering the historical project in 2000. The forecasted expenditures for 2001 are $1.8 million. These figures do not include the significant costs of making, implementing and handling appeals on the decisions on current claims. A report run at the end of April 2001 found that the Compensation Services Division made about 5,500 decisions on current claims under section 39(1)(e) during the previous six months. About 900 of these were granted relief.
>
> In addition to the costs of adjudicating and considering appeals, there is a significant cost in implementing each decision. The Board's Assessment Department must recalculate the assessment rate and experience rating of the employer for every year back to the date from which relief is granted. This can take from 15 minutes to three hours per decision. The department has a backlog of about 1,000 cost relief decisions waiting to be implemented.
>
> The Board's Actuary must also consider the transferred costs in setting assessment rates.

However, the administrative concerns raised above flow primarily from the "historical project" referred to in the Briefing Paper. This "historical project" arose as a result of the WCB's failure to follows its own published policies. As noted at the outset of this part, the published policies of the WCB require the mandatory consideration by the WCB of Section 39(1)(e) on claims exceeding 13 weeks of disability. Nevertheless, as noted on page 2 of the Briefing Paper, for many years the WCB Adjudicators did not generally follow this mandatory direction.

> *Workers' Compensation Reporter* Decision No. 271, issued on March 14, 1978, stated that the Board would automatically consider granting relief under section 39(1)(e) on claims exceeding 13 weeks of disability. In practice, this was commonly omitted or employers were not generally notified of the decision.

In later years, when knowledge of these omissions came to the attention of the employer community, many employers applied for relief of costs with respect to these "historical claims". Pursuant to Section 39(1)(e) and its own published policies, the WCB was required to adjudicate these applications.

In my opinion, it would be unreasonable and unfair to take away an employer's entitlement to be relieved of costs, pursuant to Section 39(1)(e) of the *Act*, due to the historical errors made by the WCB in not applying its own published policies.

In any event, in April 1998 the WCB Panel of Administrators initiated steps to bring to an end the adjudication of relief of costs for historical claims. As noted on page 3 of the Briefing Paper:

> The historical project is expected to conclude by the end of 2001. However, the administration of the claims adjudicated there will continue for some time.

These historical relief of costs claims will accordingly proceed through the workers' compensation system to completion, regardless of the outcome of this review. Furthermore, the development of a similar "historical" relief of costs problem should not reoccur in the future. On this point, I refer to the following sentence on page 2 of the Briefing Paper:

> In 1993, the Senior Executive Committee decided that, commencing January 1, 1994, staff would automatically issue a section 39(1)(e) decision on all claims exceeding 13 weeks.

Assuming that the WCB Adjudicators have followed this directive (and the WCB's existing published policies) since January 1, 1994, historical concerns with respect to the application and adjudication of Section 39(1)(e) claims should be exactly that – history.

Second, detractors of Section 39(1)(e) assert that it is simply a cost re-allocation mechanism, and that the WCB should not be required to expend the significant administrative efforts involved simply to re-allocate costs amongst employers. In my opinion, such detractors do not truly comprehend the purpose and value associated with the provision of relief of costs pursuant to Section 39(1)(e). As discussed above, the experience rated assessment system is based solely on the claims costs which are charged to an employer. As a result, relief of costs is much more than a simple re-allocation of these costs – it ensures that the appropriate element of equity amongst employers is maintained.

Third, the WCB Briefing Paper identified the following concern on page 5:

> Relief of costs is not an issue solely of concern to employers. Members of the worker community have raised concerns about the release of confidential medical information to employers and cost relief consulting firms when they obtain file disclosure for the purpose of making applications.

This same concern was specifically considered by the Supreme Court of British Columbia in Brand et al – and – Workers' Compensation Board of British Columbia (unreported decision of Madam Justice Newbury dated November 15, 1993; Vancouver Registry No. A932031). In this case, the employer requested relief of costs pursuant to Section 39(1)(e) several years after the WCB had provided compensation benefits to two of its workers. The workers (and their trade union) objected to the disclosure of their claims files, and in particular to the medical records in those files, to the consulting firm which was acting on behalf of the employer.

Justice Newbury described the issue before her on page 1 of the decision:

> At issue in this case is a conflict that is arising with increasing frequency – the conflict of an individual's interest in privacy and the confidentiality of his personal information, with the law's requirement for full disclosure of the case against a person in any judicial or quasi-judicial hearing affecting him.

In concluding that fully disclosure of the WCB's claims files to the employer was required for the purpose of Section 39(1)(e) of the *Act*, Justice Newbury stated the following (on pages 24 to 27):

> The second criterion is that "the element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties" – ie: the injured worker and the Board. There can be no doubt that it is desirable, from the point of view of the relationship between the Board and the workers who came within its purview, that the confidentiality of records be maintained as far as possible. But there is a competing and equally compelling principle that must be considered – the fact that disclosure is essential to the "full and satisfactory maintenance" of the relationship between employers and the Board. Furthermore, the "element of confidentiality" is very arguably bargained away by a worker mounting a claim under the Act. When he does so his medical records, theretofore held in confidence by his own physician, enter the Board's purview, just as the medical records of any other plaintiff who mounts a claim in a court of law become subject to public scrutiny. At that point, the interest of the public in seeing that the rules of natural justice are observed by a body clearly serving a quasi-judicial function, and the interest of the parties to the litigation or to the particular claim or appeal in question, overcome the privacy interest and expectation of the claimant.
>
> . . .
>
> Fourth, there is the "balancing" question – whether the injury that would enure to the relationship by virtue of the disclosure is greater than the benefit thereby obtained. In fact, this is a restatement of the larger issue that lies at the heart of this case – whether a worker's interests in the confidentiality of his own medical information is outweighed by the employer's interest in having full disclosure, albeit in connection with an appeal that is "merely financial", and in the public interest in ensuring that the Board operates in accordance with the rules of natural justice. Ms. Lee has not cited one case in which an individual's interest in the privacy of his medical records has been held to outweigh the dictates of natural justice when a direct conflict has occurred. In my view, that is because as stated in **Bergwitz v. Fast, supra**, "the public interest in the proper administration of justice outweighs in importance any public interests that might be protected" by upholding the petitioners' claims. This is not to say they do not have a legitimate interest in or expectation of privacy, but that that interest and expectation must in these circumstances give way to the larger public interest. It follows in my view that the policy considerations in favour of privilege must give

> way to those in favour of natural justice and that the disclosure to AQH of the Petitioner's full files for purposes of a s.39 appeal must be upheld.

Accordingly, it is my recommendation that relief of costs pursuant to Section 39(1)(e) should be retained in the *Act* as it currently exists.

2. Should the published policies of the WCB continue to require the mandatory consideration of Section 39(1)(e)?

As discussed above, the existing published policy requires the mandatory consideration of Section 39(1)(e) by the WCB on claims exceeding 13 weeks of disability. Should this practice be maintained, or should the WCB's consideration of relief of costs pursuant to Section 39(1)(e) only be given upon an application being made by the affected employer for such relief?

My preference would be to have the affected employer apply to the WCB in those cases where the employer believes it is appropriate for relief of costs to be granted pursuant to Section 39(1)(e). Proceeding in this manner would remove the necessity of the WCB having to consider the potential application of Section 39(1)(e) in every worker's claim which exceeds 13 weeks of disability.

In my opinion, to proceed by way of employer application must be premised on providing the affected employer with the opportunity to obtain and review the WCB's claim file before the employer determines whether to apply for relief of costs. Otherwise, the employer is proceeding "in the dark", and in effect is being required to initiate an application solely for the purpose of being entitled to receive the claim file if its request is denied. In such circumstances, I believe that the employer community would essentially be required to make mandatory applications for relief of costs, as opposed to the WCB being required to render mandatory adjudication on the issue.

However, there is a significant obstacle which effectively precludes the adoption of proceeding by way of employer application. In 1996, the Information and Privacy Commissioner of British Columbia conducted an investigation "into the practices of the Workers' Compensation Board of British Columbia with respect to disclosing personal information about injured workers to employers". In his March 3, 1996 Investigative Report, the Commissioner stated the following (on page 24) concerning the WCB's practice of providing a workers' claim file to an employer after an "appealable" decision had been rendered, but before a formal appeal had been initiated:

> As noted earlier, the WCB regards the practice of disclosing an entire file prior to the filing of an appeal as an effective mechanism to "assist both claimants and employers in deciding whether they should appeal." While that may be convenient and cost-effective for certain parties, I do not believe that this practice is adequate to meet the demands of the *Freedom of Information and Protection of Privacy Act* in preventing prejudicial fishing expeditions and is not an example of information "available by law." Nor, in my view, is it releasable under sections 33(c) or 33(d).

The Commissioner concluded that a proceeding, for the purposes of Section 3(2) of the Freedom of Information and Protection of Privacy Act (which states that the Act does not limit the information available by law to a party to a proceeding), does not take place until a formal appeal has been launched under the Workers Compensation Act. Accordingly, the Commissioner made the following Recommendation on page 29 of his Report:

> The WCB should amend its disclosure policies to reflect that a "proceeding" with respect to section 3(2) of the *Freedom of Information and Protection of Privacy Act* does not begin until either a worker or an employer has formally initiated an appeal.

The WCB subsequently revised its published policies to reflect the above recommendation. Section #99.31 of the Claims Manual currently states, in part:

> After an appeal has been initiated, an employer may obtain disclosure. An employer may obtain disclosure even though the worker has not requested disclosure.

Accordingly, only the WCB Adjudicator has access to the documentation in the claim file upon which a reasoned decision can be based as to whether relief of costs should be provided to the affected employer pursuant to Section 39(1)(e) of the *Act*. It is therefore my recommendation that the existing published policy of the WCB, requiring the mandatory consideration of the potential application of Section 39(1)(e) after a specified time frame, be maintained.

3. When should the WCB Adjudicator be required to consider the application of Section 39(1)(e)?

The legislation does not specify any particular period of time which must elapse before an employer can be granted relief of costs pursuant to Section 39(1)(e). However, such a limitation is found in the published polices of the WCB. As previously referred to, Section #114.40 of the Claims Manual provides that no consideration can be given to the application of Section 39(1)(e) until the worker has been temporarily disabled for a minimum period of 13 weeks following the injury. The WCB's rationale for this limitation is that all of the costs of a claim cannot be charged under Section 39(1)(e).

I accept the WCB's rationale that some period of time must elapse before an affected employer can be granted relief of costs pursuant to Section 39(1)(e). Presuming the worker was able to work prior to the occurrence of the compensable injury or occupational disease, notwithstanding the pre-existing disease, condition or disability, some aspect of the claims costs must be charged to the work-related cause of the worker's disability. However, I see no magic in the adoption of a period of 13 weeks.

In the "Benefits" section of this Report, I recommended that the wage rate review (for determining the average earnings of a disabled worker) should be conducted after the worker has been in receipt of temporary wage loss benefits for a period of 10 weeks from the date of injury. This recommendation requires a change to the existing practice of the WCB, whereby the wage rate review is conducted after a period of 8 weeks.

One of the primary reasons for my recommendation was to remove the necessity of having the WCB Case Manager conduct two reviews of the claim file on two separate dates – one review after 8 weeks for the determination of the worker's average earnings; and the other after 13 weeks to determine whether the affected employer should be granted relief of costs pursuant to Section 39(1)(e). My recommendation to move the wage rate review from 8 to 10 weeks was predicated on a similar adjustment being made to the Section 39(1)(e) review from 13 to 10 weeks.

Accordingly, it is my recommendation that the WCB revise its existing published policies to require the mandatory relief of costs review, pursuant to Section 39(1)(e) of the *Act*, to be conducted after the worker has been in receipt of temporary wage loss benefits for a period of 10 weeks from the date of injury.

4. Excluding back injuries from Section 39(1)(e)

Notwithstanding my recommendation that the WCB should continue to mandatorily consider the potential application of Section 39(1)(e) after a claimant has been in receipt of temporary wage loss benefits for a period of 10 weeks from the date of injury, I am sensitive to the additional efforts expended by the WCB arising from the administration and adjudication of relief of costs claims.

Based upon information provided by the WCB, claims involving back injuries to workers represent approximately 25% of all the WCB claims where a decision concerning relief of costs was made between November 13, 2000 and April 30, 2001. The next highest involved knee injuries at approximately 10%. The predominance of back injury claims, insofar as applications for relief of costs pursuant to Section 39(1)(e) are concerned, should not be too surprising, since we all face degeneration in our spinal column, in varying degrees, as part of the aging process.

In order to significantly reduce the administrative efforts associated with the adjudication of relief of costs pursuant to Section 39(1)(e), I make the following recommendations.

(i) The claims costs associated with a compensable back injury to a worker would be charged to the affected employer, for experience rating purposes, only for the initial 10 week period from the date of the worker's injury.

(ii) Any claims costs associated with a compensable back injury to a worker, after the initial 10 week period referred to in point (i) above, will be excluded from the overall claims costs used to determine the affected employer's experience rated assessment.

(iii) All of the claims costs associated with a compensable back injury to a worker will be charged to the affected employer's Rate Group.

(iv) Relief of Costs pursuant to Section 39(1)(e) will be statutorily excluded with respect to any compensable back injuries suffered by workers.

C. Other Issues

1. Section 177 of the *Act*

Prior to October 1, 1999, Section 13(2) of the *Act* provided as follows:

> Where an employer, or a worker of that employer having supervisory responsibilities, by agreement, threats, promises, inducements, persuasion or any other means seeks to discourage, impede or dissuade a worker of the employer, or the worker's dependant, from reporting to the board
>
> (a) an injury or allegation of injury, whether or not the injury occurred or is compensable under this Part;
>
> (b) an occupational disease, whether or not the disease exists or is compensable under this Part;
>
> (c) a death, whether or not the death is compensable under this Part; or
>
> (d) a hazardous condition or allegation of hazardous condition in any employment in which this Part applies,
>
> the employer commits an offence and is liable on conviction to a fine not exceeding $5,000; and the worker having supervisory responsibilities commits an offence and is liable on conviction to a fine not exceeding $1,000.

With the enactment of Bill 14 – 1998 (Workers Compensation (Occupational Health and Safety) Amendment Act, 1998), Section 13(2) was repealed. Effective October 1, 1999, a similar provision (section 177) was inserted into Part 3 of the *Act* (which deals with Occupational Health and Safety). Section 177 reads:

> An employer or supervisor must not, by agreement, threat, promise, inducement, persuasion or any other means, seek to discourage, impede or dissuade a worker of the employer, or a dependant of the worker, from reporting to the board
>
> (a) an injury or allegation of injury, whether or not the injury occurred or is compensable under Part 1,
>
> (b) an illness, whether or not the illness exists or is an occupational disease compensable under Part 1,
>
> (c) a death, whether or not the death is compensable under Part 1, or
>
> (d) a hazardous condition or allegation of hazardous condition in any work to which this Part applies.

The primary focus of Section 177 is on prohibiting employers from attempting to prevent their workers from reporting certain incidents to the WCB. Most of these "reporting" areas are focused on matters dealt with under Part 1 of the *Act* (which is entitled "Compensation to Workers and Dependants"). However, Part 3 of the *Act* applies to a more limited group of employers than those covered under Part 1.

In particular, Part 3 does not apply to any federally regulated employers, whose occupational health and safety obligations are prescribed in Part II of the Canada Labour Code. Furthermore, Section 108(2) provides that Part 3 of the *Act* does not apply to

(a) mines to which the Mines Act applies,

(b) railways to which the Railway Act applies, or

(c) subject to any regulations to the contrary, the operation of industrial camps to the extent their operation is subject to regulations under the Health Act.

The problem that arises is that federally regulated employers, and those employers to whom Part 3 of the *Act* does not apply as a result of Section 108(2), are all covered by Part 1 of the *Act*. Nevertheless, there is no statutory prohibition on these employers from attempting to prevent their workers from reporting those incidents specified in Section 177. Accordingly, it is my recommendation that Section 177 be moved back to Part 1 of the *Act* in order to apply to all employers who are covered by the mandatory compensation scheme provided under the *Act*.

Section 177 is currently limited in its scope to prohibiting employers from seeking to prevent workers from "reporting" certain incidents to the WCB. Consideration should be given to whether the ambit of the prohibition should be broadened to protect other related activities on the part of workers – such as the making or pursuing of an application for compensation under Part 1 of the *Act*.

2. Section 47(2) of the *Act*

Section 47(2) of the *Act* provides:

> An employer who refuses or neglects to make or transmit a payroll return or other statement required to be furnished by the employer under section 38(1), or who refuses or neglects to pay an assessment, or the provisional amount of an assessment, or an instalment or part of it, must, in addition to any penalty or other liability to which the employer may be subject, pay the board the full amount or capitalized value, as determined by the board, of the compensation payable in respect of any injury or occupational disease to a worker in the employer's employ which happens during the period of that default, and the payment of the amount may be enforced in the same manner as the payment of an assessment may be enforced.

In practice, Section 47(2) is only applied by the WCB where an employer fails to register with the WCB. In such circumstances, if a worker suffers an occupational injury or disease during the period of time when the employer is in default of its obligation to register with the WCB, Section 47(2) requires the WCB to charge the employer "the full amount or capitalized value" of the compensation payable in respect of the injury or disease which happens during the period of that default. Pursuant to Section 47(3) of the *Act*, the WCB has the discretion, if satisfied that the employer's default was excusable, to relieve the employer in whole or in part from the liability imposed under Section 47(2).

Relating the liability of a non-registering employer to the full capitalized value of the claim appears to be arbitrary, and can result two defaulting employers receiving significantly different treatment. For example, assume one employer fails to register with the WCB for a period of two years, but has the good fortune of having no work-related injuries occurring to any of its workers during that period. In such circumstances, the employer will only owe its outstanding assessments (with an additional percentage of the outstanding amount imposed as a penalty charge).

On the other hand, assume a second employer has failed to register with the WCB for a period of two weeks. During that period, a worker suffers a seriously disabling injury. In such circumstances, the employer not only must pay its outstanding assessments to the WCB (with the additional percentage as a penalty charge), it will also face the imposition of the additional liability under Section 47(2) of the full capitalized value of the injury suffered by the worker.

It is my recommendation that Section 47(2) of the *Act* be revised to provide for a consistent and fair additional assessment to be levied on any employer who fails to register with the WCB, regardless as to whether or not one of the employer's workers has suffered an occupational injury or disease during the period of default. The additional assessment should be significant enough to motivate compliance with the *Act*, but should not be so substantial as to be potentially devastating to the employer's ability to continue to operate its business.

For example, the additional assessment could be based on a multiple of the outstanding assessments owed by the employer (such as two or three times the outstanding assessment). In this way, the additional assessment will always correspond to the size of the employer's assessable payroll, and will not be related to the fortuitous circumstances as to whether a work-related injury (of potentially varying magnitudes) has occurred during the period of default.

Finally, if it can be established that the employer willfully intended to evade its responsibilities under the *Act* by failing to register as an employer, then the WCB should have the authority to increase the amount of the additional assessment to be imposed on that employer. For example, the WCB could have the authority to increase the additional assessment up to a specified multiple (such as up to 5 or 10 times) of the outstanding assessment depending upon the blameworthiness of the employer's conduct.

3. Section 51 of the *Act*

Section 51 of the *Act* provides:

> Where work within the scope of this Part is undertaken for a person by a contractor, both the contractor and the person for whom the work is undertaken are liable for the amount of any assessment in respect of it, and the assessment may be levied on and collected from either of them, or partly from each; but in the absence of a term in the contract to the contrary the contractor is, as between the contractor and the person for whom the work is performed, primarily liable for the amount of the assessment.

Simply stated, Section 51(1) makes the owner or principal potentially liable to the WCB for any assessments which a contractor, who is performing work for the owner or principal, was required to pay to the WCB, but failed to do so, with respect to the labour component of that work. Section 51(2) imposes a similar liability on a contractor with respect to the work performed for it by a subcontractor.

In my opinion, there is an inherent unfairness in a statutory provision which provides the WCB with the authority to impose a form of liability on an unsuspecting, and often ignorant, third party (such as a homeowner who retains a contractor to perform major renovations to the family home) in order to collect unpaid assessments. This unfairness can be compounded by the length of time which passes before the WCB initially contacts the owner or principal advising of the potential liability arising from the contractor's failure to pay its assessments.

The WCB does provide a "clearance letter" when requested which may afford some protection against a Section 51 liability. The clearance letter will inform the owner or principal whether the contractor is registered with the WCB, and whether it is in good standing with respect to its assessment remittances. However, there are some limitations associated with the WCB's clearance letter system (such as the information provided may be out-dated; and the owner or principal may need to verify the standing of the contractor on an ongoing basis).

I acknowledge that there are beneficial aspects to Section 51, such as:

(i) Owners and principals may be more vigilant in ensuring that their contractors are registered, and in good standing, with the WCB, particularly in certain specified industries such as construction and forestry. Accordingly, Section 51 is useful in getting contractors, who might not otherwise have done so, to register with the WCB.

(ii) Section 51 places the responsibility for the contractor's unpaid assessments directly on the person who benefited from the labour provided by the contractor, as opposed to passing the costs of the unpaid assessments on to all employers generally.

In my opinion, the above beneficial aspects associated with Section 51 do not outweigh its inherent unfairness as described above. Accordingly, it is my recommendation that

Section 51 be deleted from the *Act*, and that consideration be given to finding other alternatives in order to allow the WCB to achieve the benefits gained through Section 51.

For example, the legislation could provide the WCB with the authority to implement a "holdback" system in those industries which the WCB determines have prevalent use of contractors (such as construction and forestry). The WCB could then require the owner or principal to holdback a specified amount of the contract, which amount could not be released until after the contractor has established it has met its workers' compensation remittance obligations with respect to the performance of the contracted work for the owner or principal.

Similarly, the WCB could set up a "bad debt" reserve for its anticipated unpaid assessments, including the amount of the assessments that the WCB would otherwise have collected through Section 51. The total amount of this "bad debt" reserve would be funded by an administrative charge levied on all employers in BC. In this way, the potential unbudgeted liability to any one unsuspecting owner or principal would be removed.

4. The Assessment Policy Manual

The Assessment Policy Manual (the "Manual") sets out the published policies of the WCB with respect to the Assessment Department. The functions performed by the Assessment Department are described in Policy No. 10:20:00 of the Manual:

> The primary objective of the Assessment Department is to maintain the Accident Fund at a sufficient level required to administer the provisions of the *Workers Compensation Act*. . . .
>
> In order to meet the objective of collecting assessments from employers in an equitable manner, the Assessment Department operates a system of combining employers to form adequate insurance groups using industry characteristics. The Assessment Department modifies the insurance group assessment rate applied to individual employers to reflect their injury cost and/or frequency experience (experience rating). The Assessment Department also attempts to register all employers, except those exempted by the Governors of the Board, and ensures that compliance with registration and payment obligations through the application of penalty assessments, auditing payroll records, and collection activities. In addition, the Assessment Department controls the allocation of injury costs to the proper insurance groups (coding of claims).

The published policies in the Manual obviously have a substantial impact on the determination of the amount of the assessments which an employer will be required to pay to the WCB, as well as on the obligations placed on the employer in fulfilling its responsibility to pay assessments. However, many of the published policies are quite complicated, and therefore are not readily understandable to the employers who are impacted by them. By way of example, I simply refer to the published policies dealing with the concepts of "labour contractors" (in Policy No. 20:30:20) and of "multiple classifications" (in Policy No. 30:20:20).

Accordingly, it is my recommendation that the WCB conduct a comprehensive review of the published policies in the Assessment Policy Manual to ensure they are readily understandable to

(i) the WCB decision-makers who must interpret and apply the policies, and

(ii) the employer community in BC to whom the policies will be applied.

A. Overview

Under the topic "Role Clarification/Definition" in my Terms of Reference, I was asked to address the following question:

> What role should the Office of the Workers and Employers Advisers play in the workers compensation system generally, and the review and appeal process in particular?

Section 94 of the *Act* provides for the appointment, by the Lieutenant Governor in Council, of workers' advisers and employers' advisers. The duties of a workers' adviser are specified in Section 94(2):

> (2) A workers' adviser must
>
> (a) give assistance to the worker or to a dependant having a claim under this Act, except where the workers' adviser thinks the claim has no merit,
>
> (b) on claims matters, communicate with or appear before the board, review board or any other tribunal established by or under this Act on behalf of a worker or dependant where the adviser considers assistance is required, and
>
> (c) advise workers and dependants with regard to the interpretation and administration of this Act or any regulations or decisions made under it.

Section 94(3) sets out similar duties for an employers' adviser:

> (3) An employers' adviser must
>
> (a) give assistance to an employer respecting any claim under this act of
>
> (i) a worker, or
>
> (ii) a dependant of a worker
>
> of that employer, except where the employer's adviser thinks the claim has no merit,

(b) on claims matters, communicate with or appear before the board, review board or any other tribunal established by or under this Act on behalf of an employer where the adviser considers assistance is required, and

(c) advise employers with regard to the interpretation and administration of this Act or any regulations or decisions made under it.

The Workers' Advisory Office operates from Richmond and from 8 Field Offices. It has a staffing complement of 48 FTE's, consisting of the Director; 6 other management/administrative personnel (including 2 Regional Managers who have case loads); 22 workers' advisers; and 19 support staff.

The Employers' Advisory Office operates from Richmond and from7 Field Offices. It has a staffing complement of 27 FTE's, consisting of the Director; 20 employers' advisers; and 6 support staff.

The operation of both of the Advisory Offices is funded through the WCB's Accident Fund.

B. Should the two Advisory Offices be maintained?

There appears to be universal agreement that the two Advisory Offices must be retained in order to continue to provide their services to workers and employers. The written submission presented to me on behalf of disabled workers, labour and employers have all asserted this position. The Royal Commission considered the role of the two Advisory Offices (on pages 34 to 39 in Volume I, Chapter 8 of its *Final Report*, entitled "Compensation Adjudication"), and concluded that they should be retained.

The Service Delivery Core Review Report, prepared by H. Allan Hunt, also considered this issue. In clearly supporting the continuation (and expansion) of the two Advisory Offices, Mr. Hunt stated the following (on page 3-19):

> Workers' compensation systems are very complex environments. Both injured workers and employers require assistance in dealing with the system. We do not regard this as a system failure; it is simply the nature of the environment. . . . These independent advisory services are critical to the functioning of the workers' compensation system in British Columbia.
>
> . . .
>
> Canadian jurisdictions are fortunate to have avoided this slide into legalism, and we strongly support the lay service tradition. However, the Workers' Advisors and the Employers' Advisors in British Columbia are overwhelmed by the

> demand for their services. It is difficult to determine how much "excess demand" exists, but it has been estimated that the Workers' Advisors are assisting less than half of those who require assistance with their claims.
>
> If the lay service tradition is going to continue in British Columbia, the workers' Advisors' and the Employers' Advisors must be adequately supported.

I wholeheartedly support the recommendation made by Mr. Hunt. There are several reasons why the two Advisory Offices must be retained.

(i) As noted by Mr. Hunt, the workers' compensation system is a very complex environment. The adoption of the recommendations in this Report will result in certain aspects of the system becoming more complex. (For example, I refer to the recommendation that the "apportionment approach" be utilized in determining a worker's entitlement to compensation benefits as a result of being disabled by an occupational disease. Applications for compensation for "chronic stress" will also involve the adjudication of difficult issues for both workers and employers.) In my opinion, workers and employers will both require knowledgeable assistance in order to successfully navigate the complexities of our workers' compensation system.

(ii) Most of the workers who will be required to interact with the workers compensation system will be unsophisticated with respect to its operation, as will a majority of employers (particularly smaller sized employers). However, the determinations reached by the decision-makers within the workers' compensation system can have a profound impact on workers and employers.

For instance, the economic impact of work-related disabilities can be substantial for many workers. The *Act* sets out an elaborate entitlement system which will apply to the disabled worker who is seeking to obtain any compensation benefits which are payable to him/her. There can be little doubt that most workers will not have the experience or knowledge, on their own, to ensure that they receive whatever entitlements they have pursuant to the provisions of the *Act* and the published policies of the WCB.

Similarly, the legislation imposes significant financial, administrative and prevention obligations on employers. Failure to meet these obligations can have a substantial impact on the employer. For example, an employer who fails to meet its occupational health and safety requirements can be subject to significant enforcement penalties.

In my opinion, access to adequate, knowledgeable and timely assistance is essential for both workers and employers to effectively participate in a system based on significant statutory entitlements and obligations.

(iii) I previously recommended that the workers' compensation system in BC should remain an "inquiry-based" system, as opposed to becoming "adversarial-based". To achieve this objective, considerable efforts will have to be made to ensure the system is user-friendly and understandable to the participants. Mr. Hunt described how the workers' compensation system in the US has become more legalistic (on page 3-19 of his Report):

> There is a long tradition of "lay services" in Canadian workers' compensation systems. In the U.S., it is typical for an injured worker who is dissatisfied with the workers' compensation system to retain a lawyer to represent his or her case. This typically means that from one-fourth to one-third of any financial recovery goes for compensating the lawyer. Employers and insurers frequently feel compelled to also hire a lawyer to defend their interests against these claims, and the result is a significant increase in overall system costs.

In order to avoid this "slide into legalism", adequate "lay services" must be provided to both workers and employers, when required, by the Advisor Offices.

(iv) If adequate assistance is not provided within the workers' compensation system, then the level of frustration and anger among dissatisfied workers and employers will increase. This frustration and anger will no doubt turn outwards from the system – to MLA's, the Ombudsman and the media.

Accordingly, I recommend that the services provided to workers and employers by the Workers' and Employers' Advisory Offices, respectively, must be maintained in the legislation. It is my further recommendation that the Advisory Offices continue to operate externally from the WCB, and maintain their reporting relationship with the Ministry of Skills Development and Labour.

C. The role to be played by the Advisory Offices

In general terms, both the Workers' and the Employers' Advisory Offices provide the following services, in varying degrees, to their respective constituencies:

(i) advice, assistance and, when appropriate, representation;

(ii) education and training; and

(iii) consultation and "advocacy".

I will be elaborating below upon the role to be played by each of the Advisory Offices. However, I first want to raise some general comments concerning the third area of services identified above – consultation and advocacy.

Both of the Advisory Offices have been involved in the following activities:

(i) Participating in WCB meetings/committees. For example, the Directors of both Advisory Offices are members of the WCB's Practice Forum and the Policy Development Consultation Committee;

(ii) Making submissions to the Policy Bureau, the Panel of Administrators and/or the appellate tribunals on policy and practice issues of general importance. Similarly, both Offices were invited to make submissions with respect to this core review (which both Offices did).

(iii) Attending at meetings of organizations within their respective constituencies which are involved in workers' compensation matters. For example, it is my understanding that a representative from the Workers' Advisory Office used to regularly attend the meetings of the Workers' Compensation Advocacy Group. Although a workers' adviser no longer attends these meetings on a regular basis, a representative from the Workers' Advisory Office does attend on an annual basis to provide an update of what has been occurring at the Advisory Office.

Similarly, the Director of the Employers' Advisory Office attends as an observer at the meetings of the Employers' Forum to the WCB.

There have been some concerns raised as to whether it is appropriate for the Advisory Offices to perform these services. Although I do not believe these services should be a significant focus of the Advisory Offices, I do perceive some beneficial aspects. **First**, the Advisory Offices have a unique perspective into the workings of the workers' compensation system due to the substantial volume of cases they both handle. Their knowledge, expertise and experience are invaluable aids in identifying the perceived strengths and weaknesses of the system.

Second, the Advisory Offices bring a valuable insight for others to consider when issues of importance to the system are being reviewed. For example, I found the written submissions I received from each Office, as well as the meetings I held with several representatives from each Office, to be of great assistance in helping focus my attention to areas within the workers' compensation system which the Office perceived needed revision (and those areas which did not). I am confident that this same insight is brought to the WCB through the participation of the Directors of each Office on the Practice Forum and the Policy Development Consultation Committee.

Finally, I believe it is beneficial for the Advisory Offices to have some interaction with workers' compensation organizations within their respective constituencies. The Advisory Offices are providing advice and assistance to their respective constituencies, and it makes little sense for the Offices to be acting in a vacuum vis-à-vis other organizations which may be providing similar services to the same constituency.

There is a fine line to be drawn between appropriate consultation and inappropriate advocacy. For example, the two Advisory Offices are not direct stakeholders, and therefore they should not be lobbying for changes on behalf of their constituencies. However, both Offices do have unique insights into the workers' compensation system, and therefore they should have some ability to bring those insights forward for the betterment of the system.

As noted above, I do not perceive this area to be a significant role for either Office to fulfill. I do not know where the line between appropriate consultation and inappropriate advocacy should be drawn, but I do not believe that these activities should be prohibited altogether. In my opinion, it is best to simply leave it to the judgment of the Director of each Office to determine what level of consultation would be appropriate. Of course, the Director of each Office is ultimately accountable to the Government for the direction he/she takes.

1. The role of the Workers' Advisory Office

In my opinion, the primary focus for the Workers' Advisory Office must be on providing advice, assistance and, where the Office determines it is appropriate to do so, representation on claims matters for workers and their dependants. In this regard, I believe that Section 94(2)(a) and (b) reflect the appropriate focus of the Workers' Advisory Office.

A question has arisen concerning what role, if any, should the Workers' Advisory Office be filling in regard to providing advice, assistance and representation to workers (or their dependants) in other areas – namely occupational health and safety, and assessments. In my opinion, the role of the Workers' Advisory Office in these areas should be limited to only providing advice to workers (or their dependants), when required. The resources which may be available through the Workers' Advisory Office to actually represent workers must be directed to assisting workers with respect to issues concerning their entitlement to benefits under the *Act*.

Accordingly, it is my recommendation that Section 94(2)(c) of the *Act* should not be revised to provide the Workers' Advisory Office with the authority to represent workers (or their dependants) in occupational health and safety, or assessment, matters. (My recommendation on this point is premised on the existing legislation, which does not envision the WCB having any authority to impose an administrative penalty on a worker for a violation of the *Occupational Health and Safety Regulations*. However, should these circumstances change in the future, it is my opinion that Section 94(2) would need to be revised at that time to provide the Workers' Advisory Office with the authority to represent a worker who may be the subject of an administrative penalty, should the Workers' Advisory Office determine such representation to be appropriate.)

As a secondary focus, the Workers' Advisory Office should continue providing educational and training services to organizations which represent workers with respect to claims matters under the *Act*. The training of such organizations is beneficial in that it encourages alternative sources of advice and representation to be developed for workers who require such assistance in dealing with the workers' compensation system in BC.

2. The Role of the Employers' Advisory Office

While the primary focus of workers is on their entitlement to benefits under the *Act*, employers face obligations arising from all three of the areas within the BC workers' compensation system – claims, prevention and assessments. Accordingly, employers (and particularly smaller-sized employers) need access to advice, assistance and, where appropriate, representation from the Employers' Advisory Office with respect to all three of these areas.

Accordingly, it is my recommendation that Section 94(3) be revised so that the Employers' Advisory Office has the authority to provide advice, assistance and, where the Employers' Advisory Office determines it is appropriate to do so, representation to an employer on any matter within the ambit of the workers' compensation system in BC. Section 95(3) will also have to be revised to permit the Employers' Advisory Office to have access to the WCB's prevention or assessment files, as well as its claims files, with respect to any matter that the Employers' Advisory Office is dealing with on behalf of an employer.

As was the case with the Workers' Advisory Office, the Employers' Advisory Office should continue to provide educational and training services to the employer community.

Finally, representatives for employers have proposed that the Employers' Advisory Office's responsibility should be expanded to include the mandatory right to represent a defunct employer on any matter which is at the final level of appeal (ie: the proposed external Appeal Tribunal). I perceive two reasons why such a proposal would be raised:

(i) There may be a significant cost associated with the adjudication under appeal. Accordingly, the Employers' Advisory Office should be entitled to represent the defunct employer in order to ensure that the worker's entitlement to any benefits under the *Act* (and therefore the costs associated with providing those benefits to the worker) is properly adjudicated.

(ii) The appeal may involve an issue of substantial importance to the workers' compensation system in BC, and therefore input should be received on behalf of the employer community with respect to that issue before a final decision is rendered.

I do not agree with the employers' proposal. With respect to the potential costs associated with the claim under appeal, the general interest of the employer community is purely financial. In my opinion, such an interest is not sufficient, on its own, to provide mandatory standing to a third party (ie: someone other than the affected employer) to participate.

For example, if the Employers' Advisory Office is given standing to represent a defunct employer due to cost concerns, why would the Employers' Advisory Office not be entitled to have similar standing in any appeal where the affected employer does not wish to participate? Since the concern of the potential cost implications on other employers in the rate group would be the same in either scenario, wouldn't this economic rationale for standing apply whether or not the actual employer is defunct?

The second potential rationale for the Employer's Advisory Office to be given standing on behalf of a defunct employer is based upon the premise that the Employers' Advisory Office should have the responsibility of determining what issues are of substantial importance to the workers' compensation system. I do not accept this premise. In my opinion, it is for the Appeal Tribunal to determine whether an issue before it is of substantial importance to the system.

For example, assume the issue involves the standing of an estate to initiate an appeal on behalf of a deceased worker (whose employer is now defunct). Assume further that the Appeal Tribunal had recently considered the same issue on two occasions, rendering the same affirmative determination in each appeal. Although the Employers' Advisory Office may truly believe that this is still an important issue to the system, and therefore should be subject to a further examination by the Appeal Tribunal, in my opinion it is for the Appeal Tribunal itself to make that determination. If the Appeal Tribunal did determine that the issue before it was of significance to the workers' compensation system, it would have the discretion (as previously recommended elsewhere in this Report) to invite the Employers' Advisory Office and/or the relevant industry association (if there is one) to participate in the proceeding.

D. Funding of the Advisory Offices

The Royal Commission addressed the issue of the funding of the Advisory Offices on pages 38 and 39 of its *Final Report*:

> The services provided by the Workers' Advisers and Employers' Advisers are funded by the board under Section 94(1.1) to (1.3) of the Act. It is open to the government under the Act to request that the board reimburse the government for the costs of providing those services.
>
> . . . the commission sees no reason to change this arrangement in British Columbia.
>
> That said, the commission is concerned that the ministry may not recognize the full value of these offices or that, as agencies funded (indirectly) by the board, government directives and other initiatives may at times cause unnecessary or inappropriate delays or restraints on the operations of the offices.
>
> . . .
>
> Our position is: If demand for the services of these offices increases and if the quality of their performance is maintained, then – bearing in mind the need for effective management – the budgets for these offices should increase accordingly and should not be artificially frozen by ministerial budget directives.

The above comments led the Royal Commission to the following Recommendation:

> The amount of funding for the Workers' Advisers and Employers' Advisers programs should be sufficient to ensure that they can adequately discharge their mandate under the Workers Compensation Act.

As noted previously, Mr. Hunt concluded, in his Service Delivery Core Review Report, that "if the lay service tradition is going to continue in British Columbia, the Workers'

Advisors and the Employers' Advisors must be adequately supported". Mr. Hunt then made the following Recommendation (on page 3-20):

> Therefore, we recommend that the Workers' Advisors and the Employers' Advisors be expanded to meet the needs that exist. This will be particularly important during the next two to three years as the workers' compensation system changes emanating from the Core Review work their way through to implementation and the bulk of the pre-existing claims are resolved. For this period, the system will be more complex than it has been in the past and the need for assistance, especially by workers, will be even greater.

I fully concur in the recommendations made by both the Royal Commission and Mr. Hunt.

Finally, it is my opinion that the need by employers (and, in particular, smaller-sized employers) to receive timely and knowledgeable advice and assistance from the Employers' Advisory Office on claims, prevention and assessment matters is equal in its importance to the need by workers (and their dependants) to receive such advice and assistance from the Workers' Advisory Office on claims matters. At the present time, the funding resources available to the Workers' Advisory Office are substantially greater than the resources provided to the Employers' Advisory Office. (It is my understanding that the current budget for the Workers' Advisory Office is approximately $3.8 million; while the current budget for the Employers' Advisory Office is approximately $2.45 million.)

It is therefore my recommendation that both of the Advisory Offices should be provided with sufficient and equivalent funding to adequately discharge their mandate under the *Act*. I wish to raise one point of clarification with respect to this recommendation. It is certainly not my intent to have any existing funding taken from the Workers' Advisory Office and given to the Employers' Advisory Office so as to provide each with equivalent funding. Instead, it is my expectation that both Offices will require additional funding in order to be adequately resourced, particularly in light of the significant changes which are anticipated to be made to the workers' compensation system in BC.

A. Overview

The Terms of Reference raised several questions for my consideration. Most of them related to the *Occupational Health and Safety Regulations* enacted by the WCB pursuant to the Workers Compensation Act. I was also asked to:

> Identify and address issues relating to occupational health and safety arising out of the Royal Commission Reports and the subsequent enactment of Bill 14.

Occupational health and safety is such a significant and detailed topic that it could well have constituted its own separate review. Unfortunately, as was the case with the section of this Report dealing with "Funding Issues", I did not have the time to comprehensively address this topic.

Prevention of occupational injuries, diseases and fatalities is an essential component of the workers' compensation system in BC. A comprehensive review into the occupational health and safety aspect of the system was conducted by the most recent Royal Commission. Its recommendations and discussion are contained in its October 31, 1997 interim "Report on Sections 2 and 3(a) of the Commission's Terms of Reference". This *Interim Report* subsequently formed the basis of Bill 14 – 1998 (Workers Compensation (Occupational Health and Safety) Amendment Act, 1998) ("Bill 14"). Most of Bill 14 was enacted by the former Provincial Government effective October 1, 1999. Bill 14 is incorporated into the *Act* as Part 3 (which added 45 pages and 125 sections to the *Act*).

In this section, I will address the following matters:

(i) Who should be responsible for enacting occupational health and safety regulations in BC – the WCB or the Provincial Government?

(ii) The scope of review with respect to Prevention Orders rendered by the WCB.

(iii) Some general comments concerning Bill 14.

B. Who should be responsible for enacting *Occupational Health and Safety Regulations* in BC?

Under the topic "Role Clarification/Definition" in my Terms of Reference, I was asked to address the following questions:

> What role, if any, should the government play in the establishment, review and updating of occupational health and safety regulations? What is the appropriate role for WCB?

Section 225(1) of the *Act* provides the WCB with the authority to make occupational health and safety regulations:

> In accordance with its mandate under this Part, the board may make regulations the board considers necessary or advisable in relation to occupational health and safety and occupational environment.

Section 226(1) prescribes what the WCB needs to do before making regulations:

> Before making a regulation under this Part, the board
>
> (a) must give notice of the proposed regulation in the Gazette and in at last 3 newspapers, of which one must be published in the City of Victoria and one in the City of Vancouver,
>
> (b) must hold at least one public hearing on the proposed regulation, and
>
> (c) may conduct additional consultations with representatives of employers, workers and other persons the board considers may be affected by the proposed regulation.

Section 229 sets out the authority of the Minister with respect to the regulations made by the WCB:

> (1) The Minister may direct the board to consider whether the board should make, repeal or amend its regulations in accordance with the recommendation of the minister.
>
> (2) If a direction under subsection (1) is made, the board must consider the recommendations and report its response to the minister.
>
> (3) If the board does not make, repeal or amend its regulations as recommended, the Lieutenant Governor in Council may, by regulation, make, repeal or amend the regulations of the board in accordance with the recommendations of the minister.
>
> (4) On coming into force, a regulation under subsection (3) is deemed to be a regulation of the board.

BC is the only jurisdiction in Canada (with the possible exception of Quebec to a limited degree) where the WCB is provided with the statutory authority to make occupational health and safety regulations. In all other jurisdictions, the authority to approve and promulgate such regulations is exercised by Government. As noted at the outset, I have been asked to consider who should have this authority in BC – the WCB or the Government. I will first set out the advantages and disadvantages I perceive with respect to each option.

1. The WCB exercising the authority to make regulations

There are several advantages associated with the WCB retaining the authority to make the occupational health and safety regulations in BC.

(i) The WCB has the technical expertise to develop the regulations that are required to meet the occupational health and safety needs of provincially regulated workplaces in BC.

(ii) The WCB has the experience in dealing with occupational injuries, diseases and fatalities. As a result, the WCB is in the best position to design the regulations that are required to prevent or reduce the risks associated with the occurrence of such injuries, diseases or fatalities.

(iii) The WCB is perceived as being more sensitive to the timeliness of the need for change to the existing regulations, and has the ability to act when required.

(iv) The WCB process of making regulations is an open and transparent one. It has involved extensive consultation with the stakeholders, and the WCB is required by the legislation to conduct at least one public hearing before making the regulation.

(v) Having the WCB make the regulations is considered by the stakeholders to be a "politically independent" process. There seems to be a general consensus among the stakeholders that the development of occupational health and safety regulations for the workplace should not be subject to political involvement and processes.

(vi) Finally, for the reasons identified above, representatives for disabled workers, labour and employers have all supported the WCB retaining its authority to make occupational health and safety regulations in BC.

However, there are also some disadvantages associated with the WCB making the occupational health and safety regulations.

(i) The WCB has, in the past, placed a high priority on the objective of seeking consensus among the stakeholders prior to making a regulation. If consensus could not be achieved, the development and enactment of the regulation would be significantly delayed (if not derailed).

(ii) The WCB's predominant, if not sole, focus is on the occupational health and safety attributes of the proposed regulation. There is a perception that the WCB is not prone to consider its regulation making authority from the broader public interest perspective (such as considering any social policy issues inherent in the occupational health and safety regulation; or considering the proposed regulation from an overall cost/benefit perspective).

(iii) There is limited accountability on the part of the WCB for the regulations it enacts. If the public is dissatisfied with the regulations adopted by the WCB, there is no ability for the public to hold the WCB accountable at the election polls at some later date.

(iv) The WCB not only has the authority to develop and approve the occupational health and safety regulations, it also has the authority to enforce the regulations. There is a perception of unfairness which arises when the agency which enforces the regulations is not independent from the one which made the regulations.

2. The Government exercising the authority to make regulations

There are several considerations which support the Government exercising the authority to make the occupational health and safety regulations in BC.

(i) Although regulations are "subordinate" legislation to the provisions contained in the enabling statute, they are still considered to be "the law of the land". It is Government which is clearly held accountable by the electorate for the development and enactment of laws.

(ii) It is for the Government to determine the overall social policy objectives and approach to matters of significance to the population in BC – including matters relating to occupational health and safety in provincially regulated workplaces.

(iii) Government is expected and prepared to act in the best interests of the public, even when consensus among key stakeholders cannot be achieved.

However, there are also some disadvantages associated with the Government exercising the authority to make occupational health and safety regulations in BC.

(i) The Government does not have the technical expertise, nor the experience in dealing with occupational injuries, diseases or fatalities, that the WCB has.

(ii) The Government does not have the necessary internal structure in place to perform the required research into, and the development of, the occupational health and safety regulations. As a result, the Government will have to create a new bureaucracy within the Ministry to perform this function, or else the research and development aspects will have to be conducted by the WCB in any event.

(iii) Generally speaking, the Government's process for developing and approving regulations is not as open and transparent as the process utilized by the WCB with respect to the occupational health and safety regulations. Accordingly, the stakeholders would not have the same level of involvement in the process, nor would any public hearings generally be held with respect to the Government's proposed regulations.

3. The Royal Commission's Recommendation

The Royal Commission considered this issue on pages 12 to 16 of its *Interim Report*. The Royal Commission recommended that the approval of occupational health and safety regulations should rest with Cabinet. In reaching this recommendation, the Royal Commission stated the following:

> Using the permissive phrase "may make regulations" in the regulation-making sections of these statutes is not unusual; similar wording is found in other statutes. What is unusual is that in every other Canadian jurisdiction except Quebec (which delegates certain regulation-making authority to its occupational health and safety agency) the power to make regulations is held by the cabinet (ie: "the Lt. Gov. in Council may make regulations"). In BC, neither the Ministry responsible nor the provincial cabinet play any role in the decision-making process.
>
> . . .
>
> Comparing the way new occupational health and safety regulations or amendments to existing regulations are developed in Canada shows that the most common approach is one where the regulations are:
>
> - **developed** by a branch of a ministry (not a compensation board);
> - **approved** by cabinet and promulgated under the authority of the occupational health and safety statute; and
> - **enforced** by a branch of the ministry separate from the branch that developed the regulations or amendments, or a compensation board.
>
> In all cases, the compensation and rehabilitation functions remain with the provinces' compensation boards.
>
> This suggests that there are practical alternatives to the current approach to developing, and approving occupational health and safety regulations in this province. The authority to develop and approve regulations could be placed with an entity separate from the agency mandated to administer and enforce the regulations. Other jurisdictions have done this by assigning the power to develop regulations to the equivalent of a ministry of labour and giving the power to approve those regulations to the cabinet.
>
> Alternatively, the administering agency could be given a significant (if not the lead) role in developing the regulations, with cabinet having the final authority to approve the regulations. Thus, in order to amend or propose a regulation, the agency would submit a proposal to cabinet, most likely through the Minister of Labour, and cabinet would give final approval before the proposed change became law.

Under either of these options, vesting regulation-approval in the cabinet would provide the public accountability currently lacking in BC's occupational health and safety regulation-making system.

4. Conclusion

Although I recognize there are several significant advantages in having the WCB retain the authority to make occupational health and safety regulations, the bottom line is that the WCB is in effect exercising a legislative power. In my opinion, this authority should ultimately rest with the entity responsible, and held accountable, for the exercising of legislative powers – the Government. Accordingly, I have reached the same conclusion as did the Royal Commission – Cabinet should approve the occupational health and safety regulations to be promulgated under the *Act*.

Rather than creating a new bureaucracy within the Ministry to develop these regulations (which I presume is not a realistic alternative in any event), the WCB should maintain its role with respect to the development of the occupational health and safety regulations to be approved by Cabinet. There are several reasons why I believe the WCB should maintain its role:

(i) The WCB has the technical expertise and related experience required to develop the regulations.

(ii) The WCB can continue to engage in extensive consultations with the stakeholders during the developmental stage of the regulations.

(iii) The WCB is in the best position to be proactive in identifying to Government when there is a need to review or revise any aspect of the existing regulations.

There are two additional points I want to address. **First**, based upon my recommendation that Government should approve the occupational health and safety regulations, I do not believe that the WCB should be required to hold a public hearing before presenting the proposed regulations to Cabinet. In the event that the WCB retains the authority to make the regulations, then the holding of a public hearing enhances the WCB's accountability to the public. However, it is my opinion such accountability is not necessary when the WCB does not in fact have the authority to make regulations.

Second, it is my recommendation that Section 229 of the *Act* should be deleted, no matter which option the Government may choose. If the Government accepts my recommendation, then Section 229 has no purpose.

However, if the Government decides to leave the authority to make occupational health and safety regulations with the WCB, it is my opinion that the legislation should not specifically provide the Government with the authority (or the invitation) to overturn the WCB's decision. In the event that exceptional circumstances arise when the Government simply cannot accept the WCB's determination, Government always has the inherent authority to act in order to address the unique situation it faces.

C. The scope of review with respect to Prevention Orders

I have previously recommended (in the section of this Report entitled "Appellate Structure") that the scope of review should be limited on appeals from decisions by Officers in the Prevention Division to render an Order, or not to render such an Order, pursuant to Part 3 of the *Act* (with two specified exceptions which will be discussed below). In particular, the Review Manager, at the internal review level, would exercise supervisory authority over such decisions. The Review Manager's determination would be final and binding, and no further appeal could be brought to the external Appeal Tribunal.

The rationale for this limited scope of review is based on the sheer volume of the overall number of such Orders rendered by the Prevention Division. For example, I have been advised that 51,150 Orders were rendered in 2000. To allow substitutional authority over such Orders at both levels of appeal could significantly bog down the efficient and timely operation of the appellate system.

I do note that the existing legislation also restricts appeals of most Prevention Orders to only one level of review – to the Reviewing Officer pursuant to Section 199 of the *Act*. However, the existing scope of review by the Reviewing Officer is based upon the broader substitutional authority – as opposed to the more limited supervisory authority I have recommended. I have proposed this narrowing of the existing scope of review based upon the fact that the internal review process will be dealing with a much larger volume of applications for review than is the case with the Reviewing Officer pursuant to Section 199 of the *Act*. The reason for this greater volume is that the internal review process will be considering applications from decisions rendered by all of the operating Divisions of the WCB – and not just from the Prevention Division (as is currently the case with the Reviewing Officer pursuant to Section 199).

As I indicated above, there are two exceptions to this narrower scope of review of Prevention Orders. The first exception involves any Order to cancel or suspend a certificate made pursuant to Section 195 of the *Act*. These Orders would be subject to the broader substitutional scope of review at both the internal review process and at a subsequent appeal to the external Appeal Tribunal.

The rationale for this broader scope of review is based upon the significant impact the suspension or cancellation may have on the holder of the certificate. Furthermore, the volume of such Orders is nominal. (I have been advised that there were 6 Orders rendered under Section 195 in 2000.) Finally, I note that the existing legislation similarly provides for Orders under Section 195 of the *Act* to be appealed both to the Reviewing Officer (pursuant to Section 199) and subsequently to the Appeal Division (under Section 207).

The second exception applies to any Prevention Order relied upon by the WCB to impose an administrative penalty or to initiate a prosecution. These Orders would also be subject to the broader substitutional scope of review at both the internal review process and at a subsequent appeal to the external Appeal Tribunal.

The rationale for this broader scope of review of these Orders is once again based upon the significant impact an administrative penalty or prosecution can have, particularly when one recognizes the progressive nature of the administrative penalty scheme adopted by the WCB. I have been advised that in 2000 there were 350 administrative penalties recommended by the Prevention Division, and 238 were imposed.

This recommendation will result in the level of appeals for administrative penalties increasing to two from the one avenue of appeal that exists in the current legislation. (Pursuant to the combined effect of Sections 199 and 207 of the *Act*, any Order imposing an administrative penalty is appealable directly to the Appeal Division, which considers the appeal on a substitutional basis.) However, as elaborated upon in the "Appellate Structure" section of this Report, the internal review process is intended to become an essential component of the WCB's overall strategy to develop and maintain quality adjudication by initial decision-makers within the WCB, and to enhance consistency and predictability within the WCB decision-making process. I do not believe it would be appropriate to forego these objectives in those cases where the initial decision-maker within the Prevention Division has determined to impose an administrative penalty.

There is one further point I wish to address with respect to the appeal of a Prevention Order which is relied upon by the WCB to impose an administrative penalty or to initiate a prosecution. It is often the case that the WCB will rely upon previous Orders when determining whether to impose an administrative penalty on an employer. To assist in my discussion, I will refer to the following example. (I am utilizing the existing appellate system set out in Part 3 of the *Act* for the purposes of this example.)

> An order is rendered against an employer in April 2000 asserting that the employer has not complied with a specified occupational health and safety regulation. The employer disputes the allegation, and commences an application for review to the Reviewing Officer pursuant to Section 199 of the *Act*. The appeal is denied. The employer has no further right of appeal to the Appeal Division.
>
> In November 2000, the employer receives a repeat order for the same violation. This time a warning letter is issued by the WCB. Once again, the employer disputes the allegation, and commences a review pursuant to Section 199. The appeal is again denied, and the employer has no further right of appeal.
>
> In April 2001, the employer receives a third Order for the same violation. This time an administrative penalty is imposed due to the employer's "repeat non-compliance" with the regulations. The employer appeals the imposition of the administrative penalty to the Appeal Division pursuant to Section207 of the *Act*.

It is the intent of my recommendation that the employer in the above example is entitled to dispute all three of the Orders which the WCB has relied upon to warrant the imposition of the administrative penalty on the employer. To limit the employer's dispute to the last Order only would be unjust – since the employer did not have any prior opportunity to appeal the two previous Orders to the Appeal Division. (The same scenario would apply to the appellate process I have proposed involving an appeal of an administrative penalty to the external Appeal Tribunal.)

In the event that the Appeal Tribunal determines that any of the Orders relied upon by the WCB to impose the administrative penalty (ie: in the above example, the last Order or either of the two previous Orders) should be varied or cancelled, the Appeal Tribunal must have the statutory authority to direct the WCB to do so. It makes no sense for the Appeal Tribunal to determine that the administrative penalty, as imposed, cannot stand due to a concern the Appeal Tribunal has with one of the previous Orders, and then permit the WCB to retain the disputed Order, as initially rendered by the Prevention Division, on the employer's record.

D. Other Issues

1. Bill 14

As noted at the outset of this section, Part 3 of the *Act*, dealing with Occupational Health and Safety, has been in effect since October 1, 1999. Accordingly, there has only been approximately 2½ years of experience with these provisions. Nevertheless, representatives for both labour and employers have raised numerous issues concerning Part 3 for my consideration. Other than the comments which follow (concerning Division 6 – Prohibition against Discriminatory Action; and Division 5 – Right to Refuse Unsafe Work (which has not been proclaimed in force)), I unfortunately have not had the opportunity to consider the remaining areas of concern.

The Government may therefore want to give further consideration, at a later date, to the identification and resolution of any issues associated with Part 3 of the *Act*.

2. Prohibition Against Discriminatory Action

Section 150 of the *Act* defines what actions are considered "discriminatory" for the purposes of Division 6 of Part 3 of the *Act*:

> (1) For the purposes of this Division, "discriminatory action" includes any act or omission by an employer or union, or a person acting on behalf of an employer or union, that adversely affects a worker with respect to any term or condition of employment, or of membership in a union.
>
> (2) Without restricting subsection (1), discriminatory action includes
>
> (a) suspension, lay-off or dismissal,
>
> (b) demotion or loss of opportunity for promotion,
>
> (c) transfer of duties, change of location of workplace, reduction in wages or change in working hours,

> (d) coercion or intimidation,
>
> (e) imposition of any discipline, reprimand or other penalty, and
>
> (f) the discontinuation or elimination of the job of the worker.

Section 151 sets out when an employer or union is prohibited from taking or threatening discriminatory action against a worker:

> An employer or union, or a person acting on behalf of an employer or union, must not take or threaten discriminatory action against a worker
>
> (a) for exercising any right or carrying out any duty in accordance with this Part, the regulations or an applicable order,
>
> (b) for the reason that the worker has testified or is about to testify in any matter, inquiry or proceeding under this Act or the *Coroners Act* on an issue related to occupational health and safety or occupational environment, or
>
> (c) for the reason that the worker has given any information regarding conditions affecting the occupational health or safety or occupational environment of that worker or any other worker to
>
> (i) an employer or person acting on behalf of an employer,
>
> (ii) another worker or a union representing a worker, or
>
> (iii) an officer or any other person concerned with the administration of this Part.

Section 152(1) provides a worker, who considers that a employer or union has taken, or threatened to take, discriminatory action against the worker contrary to Section 151, with the option of having the matter dealt with through the governance procedure under a collective agreement, if any, or by complaint in accordance with Division 6 of the Act. In practice, the WCB requires the complainant to make an election of one or the other avenues of complaint. Section 152(3) creates a "revenue onus" of the employer or union to prove there has been no contravention of Section 151:

> In dealing with a matter referred to in subsection (1), whether under a collective agreement or by a complaint to the board, the burden of proving that there has been no such contravention is on the employer or the union, as applicable.

Section 153(2) identifies the Orders which the WCB may make if it determines a contravention of Section 151 has occurred:

> If the board determines that the contravention occurred, the board may make an order requiring one or more of the following:

(a) that the employer or union cease the discriminatory action;

(b) that the employer reinstate the worker to his or her former employment under the same terms and conditions under which the worker was formerly employed;

(c) that the employer pay, by a specified date, the wages required to be paid by this Part or the regulations;

(d) that the union reinstate the membership of the worker in the union;

(e) that any reprimand or other references to the matter in the employer's or union's records on the worker be removed;

(f) that the employer or the union pay the reasonable out of pocket expenses incurred by the worker by reason of the discriminatory action;

(g) that the employer or the union do any other thing that the board considers necessary to secure compliance with this Part and the regulations.

A determination under Section 153 respecting discriminatory action is reviewable by a Reviewing Officer pursuant to Section 199 (in Division 13 of Part 3). A further appeal can be brought to the Appeal Division pursuant to Section 207 (in Division 14 of Part 3). Both the Reviewing Officer and the Appeal Division have the broad authority to "confirm, vary or cancel" the decision under review/appeal.

It is relatively easy to identify the concerns which have arisen with respect to the application and adjudication of Division 6 of Part 3 of the _Act_. Finding the appropriate solutions, on the other hand, is not so easy.

There are several significant concerns with respect to the discriminatory action provisions set out in Part 3 of the _Act_. **First**, and foremost, is the substantial overlap which exists between the discriminatory action provisions of the _Act_ and both the labour relations and human rights environments. In its October 1, 2001 Briefing Paper entitled "Issues arising out of the enactment of Bill 14", the WCB identified these areas of overlap. After setting out the relevant provisions in Division 6 of Part 3 of the _Act_, the following is stated on page 3 of the Briefing Paper:

> Based on these provisions, there are a number of discrete decisions to be made in deciding a discrimination complaint under Part 3 of the *Act*:
>
> - Has the worker exercised a right or carried out a duty in accordance with Part 3, the regulations or an applicable order?
> - Has the employer or trade union engaged in one of the mentioned actions?

> - Is the employer's action or the union's action related to the worker's exercising his or her right or carrying out the duty?
>
> - If so, what remedy should be awarded?
>
> The WCB has specialized expertise in the administration of the occupational health and safety/occupational environment provisions of the *Act*. Only the first question relates to that specialized expertise. The remaining three questions are new ones for the WCB to determine and involve, in effect, human rights, labour relations and employment concepts and principles. Historically, the WCB has been reluctant to engage in such matters.

The Briefing Paper subsequently identified examples of this overlap. With respect to the overlap with human rights, the following comments are raised on page 5:

> In practice, however, human relations issues have arisen on discrimination complaints under the *Act*. The issues come up in the context of determining the first question noted above – has the worker exercised a right or upheld a duty under Part 3.
>
> For example, where a worker complained of sexual and personal harassment at the workplace, she relied on the WCB's jurisdiction under Part 3 and the *Occupational Health and Safety Regulation* (OHSR) over "occupational health and safety" and "occupational environment", including violence in the workplace. The overlap between human rights complaints under the *Human Rights Code* and discrimination under the *Act* was the subject matter of the decision in the case.
>
> In the decision review of the complaint, it was determined that the Part 3 provisions should not be interpreted as applying to complaints of this nature, and, the issues were more appropriately addressed under the *Human Rights Act* (where the complainant has also lodged a complaint). The decision is on appeal before the Appeal Division, awaiting final adjudication.

Turning to the overlap with labour relations, the following is stated on pages 6 and 7 of the Briefing Paper:

> Collective agreements between the employers and trade unions representing the employers' workers normally deal with the issue of termination of employment and discipline. The questions addressed through the dispute resolution mechanisms provided by the collective agreement and the *Labour Relations Code* are similar to all but the first discrimination question noted above. The *Labour Relations Code* also provides mechanisms for addressing disputes between trade unions and individual members. Likewise, the remedies provided by the discrimination provisions of Part 3 are generally also available through dispute resolution mechanisms under collective agreements and/or the *Labour Relations Code*.

In recognition of the overlap in jurisdiction of the *Labour Relations Code*, and discrimination complaints under the *Act*, the *Act* provides that a complainant may have their complaint dealt with through the grievance procedures under a collective agreement, or by complaint under Part 3. In practice, the WCB requires the complainant to make an election of one or the other.

The Division has found that dealing with discrimination complaints may often involve overlap into complex labour relations issues. These include other related ongoing disciplinary/labour relations issues, and interpretation of various provisions under a governing collective agreement. For example, the Division is presently conducting decision reviews on numerous complaints from teachers who claim that their employers have failed to pay them remuneration for attending health and safety committee meetings as required under Part 3. The initial decision made by the reviewing officers considers the conditions of employment, including interpretation and implementation of the collective agreement, under which the teachers are employed.

There are several significant problems associated with the overlapping of jurisdictions.

(i) The WCB Officers in the Prevention Division simply do not have the expertise or experience to adequately address human rights and/or labour relations/employment issues. As noted in the WCB's Briefing Paper, the WCB Officers' specialized expertise lies in the administration and application of the occupational health and safety/occupational environment provisions of the Act. Only the first of the four questions identified in the Briefing Paper relates to that specialized expertise. In my opinion, it is inappropriate to have the WCB Prevention Officers interpreting provisions of a collective agreement which applies to the complainant.

During my meeting with representatives from the WCB's Prevention Division, it was reinforced that the discriminatory action provisions fall outside of the expertise, culture and realm of the Prevention Officers. The Officers involvement in discriminatory action complaints was described as difficult; time-consuming; out-of-scope; and very deeply involved into labour relations. Simply stated, the Prevention Division believes it is being drawn into the labour relations issues of the parties through the guise of occupational health and safety.

(ii) I have been provided with information concerning numerous discriminatory action complaints which have been brought to the WCB. Although time does not permit me to describe the backgrounds to these complaints, my conclusion is that the labour relations issues are pervasive and predominant in many of them. For example, several complaints challenged the discipline which was imposed by the employer on the worker. The employer's position invariably is that the discipline was imposed for work-related reasons, such as performance problems, absenteeism, insubordination or other forms of misconduct. The worker claims that the discipline was imposed, to some degree, due to his/her exercising of a right under Part 3 of the Act.

The issue for me is not whether the employer's or the worker's assertion is the more accurate. Rather, it is whether it is appropriate to have these types of issues, which are inextricably linked to the labour relations environment, considered and adjudicated by the workers' compensation system.

(iii) The overlap between the discriminatory action provisions in the *Act*, and the human rights/labour relations environments, provides the complainant with the opportunity to commence multiple proceedings. For instance, I previously referred to the WCB Briefing Paper's discussion of the human rights overlap in a case where the worker complained of sexual and personal harassment at the workplace. In that case, the worker brought a complaint under both the *Workers Compensation Act* and the Human Rights Code. The Briefing Paper then commented upon the issue of multiplicity of proceedings (on pages 5 and 6):

> This case also illustrates that proceedings can be brought in more than one forum – through the human rights process and before the WCB. This may give a complainant a number of advantages. For example, a worker may choose to bring a complaint before the WCB because it can be resolved more quickly than by the Human Rights Tribunal, while at the same time, bring the complaint before the Tribunal because of a greater chance of success there. While the complainant may receive some benefit from this overlap, employers can find it frustrating to have to defend themselves in multiple forums.

A **second** significant concern is that the nature of a discriminatory action complaint is foreign to the workers' compensation system. A discriminatory action complaint involves a dispute between the worker and his/her employer (or union). It is completely adversarial in nature, and the issue of "fault" predominates the adjudication process.

On the other hand, the focus of the dispute in the workers' compensation system is between the affected party and the WCB. Although there may be a respondent in the case, the issue remains focused on the appropriateness of the WCB's decision. The foundation of the compensation system is based on a "no fault", and on an inquiry as opposed to adversarial, focus on adjudication.

This difference in the nature of a discriminatory action complaint once again raises the issue with respect to the ability and the appropriateness of the WCB dealing with these complaints.

Third, in my opinion the "reverse onus" concept in Section 152(3) of the *Act* tends to significantly elevate the importance of the occupational health and safety aspect of the complaint to the detriment of the underlying labour relations issues.

Pursuant to Section 152(3), once the complainant has established a prima facie case of discriminatory action as described in Sections 150 and 151, the burden of proof shifts to the employer to prove that there was no discriminatory action. The rationale for this shift in the burden of proof is based on the premise that the worker will not usually know the reason why he/she was subjected to the discriminatory action. In other words, the employer is in the best position to explain why it treated the worker the way it did.

However, Section 152(3) not only shifts the burden of proof onto the employer. It also invokes what has been referred to as the "taint theory". In particular, if the employer's motives were tainted by any "anti safety" animus (beyond the point of de minimus or trivial), then the employer will be unable to meet its "reverse onus", regardless of how predominant the other labour relations motives may have been.

The concern I have is that the underlying labour relations issues do not mysteriously evaporate when the "taint theory" is applied to the employer's motives. However, the employer's hands may well be tied, as a result of a discriminatory action complaint brought under the *Act*, to deal with a significant underlying labour relations issue.

As I stated at the outset, the concerns associated with the discriminatory action provisions in the *Act* are easy to identify. What are the potential solutions? This is a very difficult and complex question, which I unfortunately do not have the opportunity to fully canvass. However, I do have several comments I want to offer for the Government's consideration.

(i) I am not advocating for the complete deletion of Division 6 from Part 3 of the *Act*. To the contrary, I acknowledge the important public policy interest which is served by the discriminatory action provisions contained in the *Act*. In particular, a worker must be assured that he/she has the right to raise bona fide occupational health and safety concerns without fear of reprisal or recrimination.

I also acknowledge that such provisions are found in all other Canadian jurisdictions. On this point, I refer to the following excerpt on page 7 of the WCB Briefing Paper:

> All provinces and territories have discrimination provisions relating to OHS related discrimination. The bases for a discrimination complaint that a worker may bring are generally similar to those in Part 3 of the *Act*. A worker may bring a complaint against an employer for allegedly taking discriminatory action against the worker for exercising their rights or fulfilling their duties under the applicable OHS statue.

(ii) Consideration should be given as to whether complaints of discriminatory action should be considered within the workers' compensation system. As noted in the following paragraph on pages 7 and 8 of the Briefing Paper, occupational health and safety discriminatory action complaints are dealt with by labour relations boards in five other Canadian jurisdictions:

> Throughout the country, one of two kinds of forum is used to review OHS discrimination complaints: either the provincial labour boards, or the applicable OHS agency/department. Federally, and in Manitoba, Ontario, Quebec and Newfoundland, the labour relations board deals with OHS discrimination actions. In Alberta, Saskatchewan, Nova Scotia, New

> Brunswick and P.E.I. the applicable OHS agency or department deals with such actions. In the territories, redress is available through the courts.

In my opinion, the BC Labour Relations Board ("LRB") is the more appropriate forum for occupational health and safety discriminatory action complaints to be adjudicated. **First**, as discussed above, labour relations issues form a pervasive part of the discriminatory action complaints. The LRB certainly has the labour relations expertise to deal with these complaints, from both a mediation and adjudication perspective.

Second, the LRB would be in a position to address and resolve both the labour relations and occupational health and safety issues underlying the worker's complaint.

Third, the Labour Relations Code of BC already recognizes the LRB's role with respect to one area of overlap between labour relations and occupational health and safety. In particular, Section 63(3)(a) of the Labour Relations Code provides:

> An act or omission by a trade union or by the employees does not constitute a strike if
>
> (a) it is required for the safety or health of those employees, or
>
> . . .

(iii) In those cases where the complainant has established a prima facie case of discriminatory action as described in Section 150 and 151, I believe it is appropriate for the burden of proof to shift to the employer (or union) to prove that there was no discriminatory action. As noted previously, the employer is in the best position to explain why it treated the worker the way it did.

However, I do question the appropriateness of applying the "taint theory" to this reverse onus. Consideration should be given to providing the adjudicative tribunal with the authority to consider and resolve all of the underlying issues before it.

For example, if part of the employer's motive for the degree of discipline imposed on the worker was "anti-safety" animus but the predominant motive was for serious misconduct by the worker, I believe that the adjudicative tribunal should have the authority to tailor the ultimate remedy to reflect both aspects of the problem. To simply remove the total disciplinary response, due to the application of the "taint theory", makes little sense from a labour relations perspective.

(iv) The use of the word "discriminatory" in Division 6 is confusing, in that it conjures up visions of activities which would constitute "discrimination" under the Human Rights Code. It may be preferable to revise the wording in Division 6, for example to "reprisal action".

(v) Finally, there is one recommendation I want to make in the event that the adjudication of discriminatory action complaints remains within the workers' compensation system. In these circumstances, the initial decision-maker's determination should be subject to only one level of review/appeal – by the external Appeal Tribunal. In other words, no application could be brought to the internal review process from any initial determination under Division 6 of Part 3 of the Act.

I recognize this recommendation is inconsistent with previous ones where I concluded that all initial decisions emanating from the WCB should be considered by the internal review process (for the purposes of quality assurance, and of enhancing consistency and predictability). Nevertheless, I base this exception for discriminatory action complaints on the following reasons.

First, as discussed previously, the nature of discriminatory action complaints is foreign to the workers' compensation system, in that it is based on fault and adversarial concepts between the worker and the employer. I believe the external Appeal Tribunal will be the most (if not only) appropriate tribunal within the workers' compensation system to deal with the nature of these cases.

Second, labour relations issues have been a pervasive element of these type of complaints. In my opinion, the Review Managers at the internal review level will not have the expertise or experience to adequately adjudicate these matters.

Third, the WCB's experience to date has demonstrated that these complaints tend to be difficult and time-consuming ones to adjudicate. I do not believe that the flexible and informal nature of the internal review process can adequately accommodate these cases. Nor do I believe it would be appropriate to require these complaints to be considered at two levels of appeal, both on a substitutional basis.

3. Right to Refuse Unsafe Work

In its *Interim Report,* the Royal Commission recommended that the core social policy objectives and principles for occupational health and safety should be determined by the Government and specified in the enabling legislation (as opposed to being determined by the WCB and set out in the Regulations, as was the case at the time of the Royal Commission). One area in particular which the Royal Commission believed should be enshrined in the legislation involved what are referred to as "Worker Rights" (ie: the worker's right to know, the right to participate, and the right to refuse).

Bill 14 acted upon the Royal Commission's recommendation and included all three "Worker Rights" within the legislation. Division 5 of Part 3 of the Act, as proposed in Bill 14, was entitled "Right to Refuse Unsafe Work". However, due to differing concerns raised by both labour and employers, the previous Provincial Government never enacted Division 5. Accordingly, the concept of a worker's right to refuse unsafe work is still dealt with in the *Occupational Health and Safety Regulation* (in Sections 3.12 and 3.13).

In my opinion, it is time for the third worker right – the right to refuse unsafe work – to be brought into the _Act_. Accordingly, it is my recommendation that the _Act_ be revised to incorporate the appropriate provisions concerning the worker's right to refuse unsafe work, even if that means simply reproducing Sections 3.12 and 3.13(2) of the *Occupational Health and Safety Regulation* within the _Act_.

4. Section 73(1) of the *Act*

Section 73(1) reads as follows:

> If
>
> (a) an injury, death or disablement from occupational disease in respect of which compensation is payable occurs to a worker, and
>
> (b) the board considers that this was due substantially to
>
> (i) the gross negligence of an employer,
>
> (ii) the failure of an employer to adopt reasonable means for the prevention of injuries, deaths or occupational diseases, or
>
> (iii) the failure of an employer to comply with the orders or directions of the board, or with the regulations made under Part 3 of this Act,
>
> the board may levy and collect from that employer as a contribution to the accident fund all or part of the amount of the compensation payable in respect of the injury, death or occupational disease, to a maximum of $40,000.

(As of January 1, 2002, the maximum amount referred to at the end of Section 73(1) is $42,435.15.)

I find Section 73(1) to be objectionable for two reasons. **First**, it places the employer in a position of double jeopardy if the employer fails "to adopt reasonable means for the prevention of injures, death or occupational disease" or "to comply with the orders or directives of the board, or with the regulations made under Part 3 of this Act". On this point, I refer to Section196(1), which specifies when the WCB may impose an administrative penalty on an employer:

> The board may impose an administrative penalty in accordance with this section if it considers that
>
> (a) an employer has failed to take sufficient precautions for the prevention of work related injuries or illnesses,
>
> (b) an employer has not complied with this Part, the regulations or an applicable order, or

(c) a workplace or working conditions are not safe.

Furthermore, if the WCB does consider that the worker's injury, death or disablement from occupational disease was due substantially to "the gross negligence of an employer", the published policy of the WCB in its Prevention Manual provides the WCB with the discretion to vary the "basic amount" of the proposed administrative penalty by up to 30%. (See Policy Item: D12-196-6.)

Second, the potential charging of the claims costs directly to the employer undermines one of the foundations of the historic compromise – that employers are required to fund, on a collective basis, the workers' compensation system which provides no-fault benefits to disabled workers.

Accordingly, I see no merit in permitting the WCB to levy an administrative penalty on a defaulting employer, and to require the employer to personally pay a portion of the claim costs. It is therefore my recommendation that Section73 should be deleted from the *Act*.

SUMMARY OF RECOMMENDATIONS

Re: GOVERNANCE

1. The new governing structure of the Workers' Compensation Board (the "WCB") should be called the Board of Directors.

2. The *Act* should specify that the Board of Directors consist of a maximum of seven voting Directors as follows:

   (i) The Chair;

   (ii) One worker representative;

   (iii) One employer representative; and

   (iv) Four public interest representatives;

3. The *Act* should provide that the President/CEO of the WCB be appointed as a non-voting member of the Board of Directors.

4. The Chair of the new Appeal Tribunal should not be appointed as a member of the Board of Directors.

5. The authority to appoint representatives to the Board of Directors should reside with the Lieutenant Governor in Council.

6. The legislation must clearly specify that the primary responsibility of each Director must be to the workers' compensation system as a whole and to all its stakeholders. (See recommendation #11(a) below).

7. Subject to Recommendation #8 below, the *Act* should specify that the term of appointment for each Director be three years, with the exception of the Chair whose term should be for five years.

8. Notwithstanding the above Recommendation, in order to provide for staggered terms the initial appointments of the 6 worker, employer and public interest Directors should be as follows:

   (i) Three Directors would be appointed for 3 year terms, and

   (ii) The remaining three Directors would be appointed for 4 year terms.

9. A Director's potential appointment should be restricted by the legislation to two successive terms (ie: his/her initial term of appointment and one term of reappointment).

10. The *Act* should provide that an individual appointment to the Board of Directors can be revoked only for cause, including a breach of trust associated with a legislated duty.

SUMMARY OF RECOMMENDATIONS

11. The legislation should specify the following statutory duties with which the Directors must comply:

    (i) To act in the best interests of the workers' compensation system and to all of its stakeholders;

    (ii) To act honestly and in good faith;

    (iii) To exercise the care, diligence and skill of a reasonably prudent person;

    (iv) To avoid conflicts of interest, as specified in the bylaws of the Board of Directors; and

    (v) To act in a financially responsible and accountable manner in exercising its powers and performing its duties.

12. The representatives on the Board of Directors should be appointed on a part-time basis.

13. The legislation should specify the responsibilities to be fulfilled by the Board of Directors, which would include, but not be limited to:

    (i) Selection and evaluation of the President/CEO of the WCB;

    (ii) Approval of the operating and capital budgets of the WCB;

    (iii) Approval of the published policies of the WCB;

    (iv) Approval of major programs and expenditures undertaken by the WCB,

    (v) Overall responsibility for ensuring the protection of the WCB's assets and investments;

    (vi) Setting the strategic direction for the WCB, and evaluating its progress;

    (vii) Ensuring the adequate funding of the Accident Fund;

    (viii) Monitoring the organizational performance by the WCB, and requiring corrective action to be taken where necessary; and

    (ix) Enacting bylaws for the conduct of the business and functions of the Board of Directors, including any bylaws which may be required in the legislation.

14. The bylaws of the Board of Directors must provide the Chair of the Board of Directors with the authority to designate one of the four public interest Directors to act in the Chair's place during his/her temporary absence, and while so acting the designated Director would have the power and authority of the Chair. In the event that the Chair is absent and no such designation has been made, the remaining Directors would have the authority to determine which of the four public interest Directors would act in the Chair's place during his/her absence.

15. The Government's role, with respect to governance within the workers' compensation system in British Columbia, would include:

    (i) Setting the mandate and objectives of the system through the enabling legislation;

    (ii) Appointing the representatives to the Board of Directors of the WCB; and

    (iii) Holding the system accountable for achieving the objectives set out in the legislation.

    The Government should not itself be directly represented on the Board of Directors.

16. The *Act* should specify that a quorum for conducting the business of the Board of Directors be set at a majority of the voting Directors who have been appointed. A decision of the majority of the Directors constituting the quorum would be the decision of the Board of Directors.

17. The bylaws of the Board of Directors must provide the Chair of the Board with the discretion to call a vote with respect to a particular issue. In such circumstances, the Chair would take part in the voting process in the same manner as the other voting Directors.

SUMMARY OF RECOMMENDATIONS

Re: APPELLATE STRUCTURE AND RELATED TOPICS

1. The following appellate structure should be adopted in the legislation for the determination of all adjudicative issues in dispute within the workers' compensation system:

   (i) an initial internal review conducted by the WCB, followed by

   (ii) an appeal to a tribunal which is external to, and independent from, the WCB.

2. The *Act* should provide that any adjudicative decision made by a WCB Officer with respect to a claims, prevention/occupational health and safety, or assessment/classification issue, which affects:

   (i) a worker covered by the *Act*, or

   (ii) in the case of a deceased worker, his/her dependants covered by the *Act*, or

   (iii) an employer covered by the *Act*, or

   (iv) any other person who may be the focus of a specific entitlement or obligation under the *Act*

   could be the subject matter of an application for internal review.

3. The subject matter of the internal review would encompass any issue which the Review Manager believes should have reasonably been dealt with by the initial decision-maker in his/her decision letter.

4. The *Act* must specifically exclude Review Managers, who conduct the internal review, from the bargaining unit represented by the Compensation Employees Union.

5. The internal review process must be operated separately from the Compensation Services, Prevention and Assessment Divisions of the WCB.

6. The WCB's internal review division should be headed by an individual at the Director's level. The Director would primarily be responsible for the management and administration of the internal review process. However, the Director would also adjudicate internal review applications when he/she felt it would be appropriate to do so.

7. The internal review should be conducted by one Review Manager, who would have similar access to statutory powers as are currently specified in Sections 205(1) and (3) of the *Act*.

SUMMARY OF RECOMMENDATIONS

8. Subject to Recommendation #10 below the *Act* would provide the Review Manager with substitutional authority with respect to the issues which are the subject matter of the internal review.

9. New evidence provided to the Review Manager, which is substantial and material to the decision under review, should not be referred back to the initial decision-maker for his/her further consideration and determination.

10. The *Act* should specify that the Review Manager would exercise supervisory authority with respect to the following issues which are the subject matter of an internal review:

    (i) Decisions by the Prevention Division to render an Order, or not to render such an Order, pursuant to Part 3 of the *Act*, with the exception of Orders which are relied upon by the WCB to impose an administrative penalty or to initiate a prosecution, or of any Orders to cancel or suspend a certificate made pursuant to Section 195 of the *Act*.

    (ii) Decisions rendered by the Assessment Department concerning the Rate Group or Industry Subsector/Sector to which an industry is assigned for assessment purposes.

    (iii) Any vocational rehabilitation decisions made by the WCB concerning the eligibility, nature and extent of vocational rehabilitation services provided to disabled workers (pursuant to Section 16(1) of the *Act*) or to surviving dependants of a deceased worker (pursuant to Sections 16(2) and (3) of the *Act*).

    (iv) Decisions applying the indicated percentage of impairment of earnings capacity on the Permanent Disability Evaluation Schedule or on the permanent impairment rating schedule for chronic pain (to be developed by the WCB), provided that the specified percentage of impairment has either no range, or a range which does not exceed 5%.

    (v) Decisions whether or not the WCB should commute a pension or survivor benefit award.

    (vi) Any decisions made by the WCB concerning the eligibility, nature and extent of any allowances or similar expenditures which the WCB has the discretion to provide, including

        (a) clothing allowances,

        (b) personal care expenses or allowances,

        (c) independence and home maintenance allowances,

        (d) transportation allowances,

(e) subsistence allowances, and/or

(f) homemakers' services.

11. With respect to an appeal involving any of the issues specified in Recommendation #10 above, the grounds of review specified in the legislation, upon which the Review Manager's supervisory authority would be based, are:

    (i) error of fact which had a substantial and material impact on the decision reached by the initial decision-maker, or

    (ii) error of law, or

    (iii) contravention of a published policy of the Board of Directors.

12. The *Act* should provide that an application for internal review must be brought within 90 days from the day the decision in dispute was communicated, in writing, to the affected party. The published policies of the WCB should require the written decision letter rendered by the initial decision-maker to clearly indicate any right which may exist with respect to an application for internal review, including reference to the 90 day time frame within which such an application must be commenced.

13. The legislation must require the application for internal review to:

    (i) be made in writing or in another manner acceptable to the WCB;

    (ii) identify the decision for which a review is requested; and

    (iii) state the basis on which the application for review is made and the outcome requested.

14. The *Act* should provide the Director of the internal review division, or his/her delegate, with the discretion to grant an extension of time with respect to the commencement of an application for internal review in order to avoid an injustice where the appealing party has missed the mandatory time limit for commencing the application for internal review.

15. Once an application for internal review is submitted (within the 90 day, or any extended, time frame), the *Act* should require the WCB to provide the disclosure documentation from its files to the applicant, as well as to any interested party who will have the right to participate as a respondent.

16. The *Act* would specify that the decision of the Review Manager must be rendered within 150 days of the commencement of the application for an internal review. The actual "commencement" date would start on the day that the disclosure documentation is provided to the applicant.

17. The *Act* should provide the Director of the internal review division, or his/her delegate, with the discretion to extend the 150 day period in which the Review Manager must render his/her decision:

(i) where the complexity of the matter under review makes the 150 day period impracticable, or

(ii) when the applicant requests a delay in the proceedings, in order to submit new evidence or submissions.

18. When the applicant requests a delay in the proceedings, the legislation should specify that the maximum amount of the extension which can be granted would be 45 days. The respondent would, if requested in order to submit new evidence or submissions, then be entitled to receive an extension up to the length of the extension period granted to the applicant.

19. The published policies of the WCB should require the written letter rendered by the Review Manager to indicate any right with respect to a further appeal to the external Appeal Tribunal, including reference to the time limit within which such an appeal must be commenced.

20. The legislation should provide the Director of the internal review division (or his/her delegate) with the authority to suspend an application for internal review in the following circumstances:

(i) The power to suspend would only be utilized when there are one or more related issues pending determination by the initial decision-maker.

(ii) A request to suspend the application for internal review can originate through:

(a) the appellant, or

(b) the Director (or his/her delegate) on his/her own motion.

In the latter situation, the appellant must consent before the application for internal review could be suspended by the Director.

(iii) Once an application for internal review is suspended, it would be held in abeyance pending the determination of the related issue(s) by the initial decision-maker. The appellant would then have 90 days from the date of such determination to reactivate his/her suspended application for internal review.

21. The *Act* would specify that an application for internal review does not operate as a stay of the decision under appeal, unless the Review Manager directs otherwise.

22. In determining an application for internal review, the Review Manager would have the statutory authority to

(i) confirm, vary or cancel the decision under review, or

(ii) refer the matter back to the initial decision-making level of the WCB to conduct any further inquiry and to render any further decision that the Review Manager may direct is necessary.

SUMMARY OF RECOMMENDATIONS

23. A Review Manager would have no statutory authority to reconsider his/her decision once it has been rendered to the interested parties.

24. The responsibility for appointing the Chair of the external Appeal Tribunal should rest with the Lieutenant Governor in Council. The Chair must be independent from Government and from the WCB.

25. The statutory responsibilities of the Chair of the Appeal Tribunal would include, but not be limited to:

    (i) the appointment and re-appointment of Vice-Chairs and Members of the Appeal Tribunal (on a full-time, part-time or contract basis);

    (ii) setting the performance measurements for the Vice-Chairs and Members of the Appeal Tribunal, and evaluating the Vice Chairs and Members in accordance with those performance measurements;

    (iii) the overall administration of the Appeal Tribunal, including budgeting and hiring of staff;

    (iv) the overall responsibility for the administration and operation of Medical Review Panels;

    (v) the establishment of policies and procedures for the administrative and substantive conduct of the Appeal Tribunal's business;

    (vi) presiding over meetings of the Appeal Tribunal;

    (vii) adjudicating appeals brought to the Appeal Tribunal, either as a one-person Panel or as the Chair of a three-person (or greater) Panel;

    (viii) establishing Panels to determine appeals brought before the Appeal Division;

    (ix) granting of extensions of time with respect to the commencement of an appeal to the Appeal Tribunal, or to the time frame within which the Appeal Tribunal's decision must be rendered;

    (x) deciding whether an appeal should be suspended pending the determination of related issues at a lower level of adjudication; and

    (xi) delegating, in writing, any of the Chair's powers and duties subject to any terms and conditions set out in the delegation.

26. The *Act* should specifically require the Chair of the Appeal Tribunal to attend the meetings of the WCB Board of Directors on a regular basis (at least quarterly) to report on matters of common interest and importance from the perspective of the Appeal Tribunal.

27. Consideration should be given to the legislation specifically providing for an Executive Director position within the Appeal Tribunal. This position would be

appointed by, and would report to, the Chair of the Appeal Tribunal, and would be responsible for all of the administrative aspects of the Appeal Tribunal.

28. The *Act* should provide the Chair of the Appeal Tribunal with the authority to appoint a complement of Members up to a maximum of two "full-time equivalent" worker Members and two "full-time equivalent" employer Members (on a full-time, part-time or contract basis). Appointed Members cannot be assigned to act as one person Panels in determining appeals before the Appeal Tribunal, or as the presiding Chair of a three-person Panel.

29. The legislation should specify the term of appointment for Vice-Chairs, and for any Members, to be three or four years (unless the particular Vice-Chair or Member is appointed on a contract basis, in which case the term of appointment will be as specified in the contract, up to a maximum of four years), and the term of appointment for the Chair to be five years. Any of these appointments should be eligible for reappointment.

30. The *Act* should expressly exclude the Chair, Vice Chairs and Members of the Appeal Tribunal from any bargaining unit representation by a trade union.

31. The *Act* should provide that the appointment of the Chair, any Vice-Chair or any Member can be revoked only for just cause. Just cause would not arise in a case where a decision is made with which the Government (with respect to a decision made by the Chair) or the Chair (with respect to a decision made by a Vice-Chair or a Member) does not agree.

32. The *Act* should specify that, subject to Recommendation #36 below, any decision made by a Review Manager during the internal review process would be appealable to the external Appeal Tribunal. The subject matter of the appeal would encompass any issue which the Appeal Tribunal believes should have reasonably been dealt with by the initial decision-maker in his/her decision letter, or by the Review Manager during the subsequent internal review process.

33. The legislation should expressly state that any decision by the Director of the internal review division (or his/her delegate) to grant, or not to grant, an extension of time cannot be made the subject of an appeal to the Appeal Tribunal.

34. The *Act* should provide the Appeal Tribunal with substitutional authority with respect to the appeals before it.

35. New evidence provided to the Appeal Tribunal, which is substantial and material to the decision under appeal, should not be referred back to either the initial decision–maker or the Review Manager for their consideration prior to the Appeal Tribunal rendering its decision in the matter.

36. The *Act* would specify that the decision of the internal review process is final and conclusive, and no further appeal can be brought to the Appeal Tribunal, with respect to the following issues:

    (i) Decisions by the Prevention Division to render an Order, or not to render such an Order, pursuant to Part 3 of the *Act*, with the exception of Orders which are relied upon by the WCB to impose an administrative penalty or to initiate a prosecution, or of any Orders to cancel or suspend a certificate made pursuant to Section 195 of the Act.

(ii) Decisions rendered by the Assessment Department concerning the Rate Group or Industry Subsector/Sector to which an industry has been assigned for assessment purposes.

(iii) Any vocational rehabilitation decisions made by the WCB concerning the eligibility, nature and extent of vocational rehabilitation services provided to disabled workers (pursuant to Section 16(1) of the Act) or to surviving dependants of a deceased worker (pursuant to Sections 16(2) and (3) of the Act).

(iv) Decisions applying the indicated percentage of impairment of earnings capacity on the Permanent Disability Evaluation Schedule or on the permanent impairment rating schedule for chronic pain (to be developed by the WCB), provided that the specified percentage of impairment has either no range, or a range which does not exceed 5%.

(v) Decisions whether or not the WCB should commute a pension or survivor benefit award.

(vi) Any decisions made by the WCB concerning the eligibility, nature and extent of any allowances or similar expenditures which the WCB has the discretion to provide, including

(a) clothing allowances,

(b) personal care expenses or allowances,

(c) independence and home maintenance allowances,

(d) transportation allowances,

(e) subsistence allowances, and/or

(f) homemakers' services.

37. The legislation should provide the Appeal Tribunal with a broad array of mechanisms in order to resolve the appeals brought to it, and should include alternate dispute resolution, pre-hearing conferences, the pooling of similar appeals into one hearing, and the use of "Super Panels" consisting of more than three persons to adjudicate matters of policy or law which are of significant importance to the workers' compensation system as a whole.

38. The appropriate WCB representatives must be involved in the alternate dispute resolution process at the Appeal Tribunal if ADR is to be an effective resolution mechanism.

SUMMARY OF RECOMMENDATIONS

39. The Appeal Tribunal should have the statutory authority to compel a participating party to attend a pre-conference hearing. Failure to comply should have direct consequences for the party in question.

40. Decisions rendered by a Super Panel of the Appeal Tribunal must generally be followed by subsequent Panels of the Appeal Tribunal, unless the circumstances of the subsequent appeal before the Appeal Tribunal Panel clearly distinguish its case from that determined by the Super Panel.

41. The decision as to whether or not an oral hearing should be held, with respect to any particular appeal, would rest within the discretion of the Appeal Tribunal. The Appeal Tribunal should develop appropriate guidelines with respect to the criteria which would be considered in determining whether or not an oral hearing should be held.

42. The Appeal Tribunal should have similar statutory powers to conduct an appeal which is before it as is currently held by the Appeal Division pursuant to Sections 85.1 and 87 of the *Act*.

43. The Appeal Tribunal should not have the authority to retain jurisdiction over the WCB's implementation of the Tribunal's decision.

44. The legislation should provide the Appeal Tribunal with the discretion to invite other persons or groups to participate in a proceeding where such participation will assist the Appeal Tribunal's inquiry into the merits of the issues before it.

45. Where a worker has brought an appeal to the Appeal Tribunal, and the worker's employer is no longer registered with the WCB at the time of the proceeding, the legislation should provide the Appeal Tribunal with the discretion to invite the Employers Advisory Office and/or the relevant industry association to participate in the proceeding.

46. The *Act* should provide that an appeal to the Appeal Tribunal, from a decision rendered by the Review Manager, must be brought within 30 days from the day the decision in dispute was communicated, in writing, to the affected party.

47. The *Act* should specify that the appeal to the Appeal Tribunal must be made in writing, or in another manner acceptable to the Appeal Tribunal; identify the decision from which an appeal is brought; and state the basis on which the appeal is made and the outcome requested.

48. The *Act* should provide the Chair of the Appeal Tribunal (or his/her delegate) with the discretion to grant an extension of time, with respect to the commencement of the appeal, in order to avoid an injustice where the appealing party has missed the mandatory time limit for commencing the appeal.

49. Once an appeal is submitted (within the 30 day, or any extended, time frame), the *Act* should provide the Appeal Tribunal with the authority to direct the WCB to provide an update of the disclosure documentation from its files to the parties of interest in the appeal.

SUMMARY OF RECOMMENDATIONS

50. The *Act* would specify that the decision of the Appeal Tribunal must be rendered within 180 days of the commencement of the appeal. The actual "commencement" date would start on the day that the updated disclosure documentation is provided to the appellant.

51. The *Act* should provide the Chair of the Appeal Tribunal (or his/her delegate) with the discretion to extend the 180 day period in which to have the Appeal Tribunal Panel render its decision:

    (i) where the complexity of the matter under appeal makes the 180 day period impracticable, or

    (ii) when the appellant requests a delay in the proceedings in order to submit new evidence or submissions.

52. When the appellant requests a delay in the proceedings, the legislation should specify that the maximum amount of the extension which can be granted would be 45 days. The respondent would, if requested in order to submit new evidence or submissions, then be entitled to receive an extension up to the length of the extension period granted to the appellant.

53. Where a Panel of the Appeal Tribunal is constituted of three (or more) persons, the *Act* would specify that the decision of a majority of the Panel shall be the decision of the Appeal Tribunal. However, if there is no majority, the decision of the person presiding over the Panel shall be the decision of the Appeal Tribunal.

54. The legislation should provide the Chair of the Appeal Tribunal (or his/her delegate) with the authority to suspend an appeal in the following circumstances:

    (i) The power to suspend shall only be utilized when there are one or more related issues pending determination at a lower level of adjudication.

    (ii) A request to suspend the appeal can originate through:

        (1) the appellant, or

        (2) the Chair (or his/her delegate), on his/her own motion.

        In the latter situation, the appellant would have to consent before his/her appeal could be suspended by the Chair.

    (iii) Once an appeal is suspended, it would be held in abeyance pending the determination of the related issue(s) by the internal review process. The appellant would then have 30 days from the date of such determination to reactivate his/her suspended appeal.

55. Subject to Recommendation #56 below, the *Act* would specify that an appeal to the Appeal Tribunal does not operate as a stay of the decision under appeal, unless the Appeal Tribunal directs otherwise.

SUMMARY OF RECOMMENDATIONS

56. In the event the affected employer appeals a decision of the Review Manager (overturning the initial decision-maker's denial of the application for compensation), the legislation would specify that compensation benefits be paid prospectively from the date of the Review Manager's decision, but retrospective compensation would not be paid pending the decision of the Appeal Tribunal. If the Appeal Tribunal subsequently decides in favour of the worker, interest on the retrospective compensation must be paid to the worker (or, in the case of a deceased worker, his/her dependants).

57. In determining an appeal, the Appeal Tribunal Panel would have the statutory authority to

    (i) confirm, vary or cancel the decision under appeal, or

    (ii) refer the matter back to the initial decision-making level of the WCB to conduct any further inquiry and to render any further decision that the Panel may direct is necessary.

58. The Appeal Tribunal should have the statutory responsibility of adjudicating those cases which are referred pursuant to Section 11 of the *Act*.

59. The Appeal Tribunal would have no statutory authority to reconsider any of its previous decisions (or of any decision of a predecessor appellate tribunal, be it the former Commissioners of the WCB, the Review Board or the Appeal Division), subject to the authority of the Appeal Tribunal to reconsider one of its own decisions on the basis of an error of law "going to jurisdiction".

60. Subject to the Appeal Tribunal's authority to reconsider one of its previous decisions on the basis of error of law going to jurisdiction, the *Act* would specify that a decision rendered by the Appeal Tribunal:

    (i) is considered final and conclusive, and

    (ii) would be protected from a Court challenge by a privative clause similar to what is currently found in Section 96(1) of the *Act*.

61. The legislation should require the Appeal Tribunal to make its decisions accessible to the public in a manner which ensures the confidentiality of the parties to the appeal.

62. The formal appeal process to the Medical Review Panel (currently set out in Sections 58 to 66 of the *Act*) should be abolished.

63. The *Act* should provide that the new MRP process would become part of the external Appeal Tribunal. Access to the MRP would only be available in those cases where a valid appeal has been commenced with the Appeal Tribunal.

64. The legislation would specify that a referral of a medical issue to the MRP could be initiated in one of two ways:

(i) by a request to the Appeal Tribunal Panel made by the affected worker (or, in the case of a deceased worker, his/her dependants) or the affected employer, or

(ii) by the Appeal Tribunal, on its own motion.

65. The *Act* would specify that the ultimate determination as to whether a referral should be made to the MRP would rest within the discretion of the Appeal Tribunal Panel assigned to the particular appeal. The Appeal Tribunal should develop guidelines setting out the criteria it would consider in determining whether or not a request for a referral of a medical issue to the MRP by a party of interest should be accepted.

66. The *Act* would require the Appeal Tribunal Panel assigned to the appeal to determine the medical issues upon which the MRP will be requested to provide an opinion, and to prepare a statement of the non-medical facts upon which the MRP must base its medical findings.

67. With respect to the appointment of physicians to serve as Chairs of the Medical Review Panel process, the legislation would require the Chair of the Appeal Tribunal:

(i) in consultation with the medical community, including at a minimum the College of Physicians and Surgeons of British Columbia, to establish and maintain a list of duly licensed physicians to be available to serve as Chairs of Medical Review Panels, which list may be amended from time to time; and

(ii) to establish terms and conditions of appointment and administrative performance criteria with respect to physicians who are appointed to serve as a Chair of a Medical Review Panel.

68. With respect to the appointment of specialists for the Medical Review Panel process, the legislation would require the Chair of the Appeal Tribunal:

(i) in consultation with the medical community, including at a minimum the College of Physicians and Surgeons of British Columbia, to establish and maintain a list of duly certified and licensed specialists in particular classes of injuries and disabilities in respect of which workers have claimed compensation, which list may be amended from time to time; and

(ii) to establish terms and conditions of appointment and administrative performance criteria with respect to specialists who are appointed to serve on a Medical Review Panel.

69. The *Act* would specify that the MRP be constituted by three persons – a Chair of the MRP and two specialists.

70. The Appeal Tribunal should take the following steps with respect to the constitution of the MRP:

SUMMARY OF RECOMMENDATIONS

(i) The Appeal Tribunal would select the Chair of the MRP with respect to the particular referral.

(ii) The Appeal Tribunal would determine what specialties (either one or two) should be represented on the MRP, and then would select the appropriate physicians to the MRP from those specialties.

(iii) The Appeal Tribunal would advise the parties of interest of the names and relevant backgrounds of the Chair and the specialists selected to the MRP. The parties of interest would be given a brief period of time to raise any grounds of objection either may have to one or more of the selected physicians.

(iv) If any objection was upheld by the Appeal Tribunal, another physician would be selected as the Chair and/or specialist on the MRP. Once again, the Appeal Tribunal would advise the parties of interest of the name and relevant background of the new selection, and provide a further period of time for any objection to be raised.

71. The exclusionary grounds in Section 59(1) of the *Act*, which specify several circumstances which would exclude a specialist from being selected to the MRP in a particular claim, should be retained in the legislation with respect to the selection of either the Chair and/or the specialists to the MRP.

72. If one of the members of the MRP is unable to proceed after his/her selection to the MRP, the Appeal Tribunal Panel should have the statutory authority to:

(i) have the MRP continue with only the remaining members, or

(ii) request a replacement be appointed to the existing MRP, or

(iii) constitute a new MRP.

73. The *Act* should provide that it initially be left to the discretion of the Appeal Tribunal Panel making the referral to determine whether, in the circumstances of the medical issue in dispute, it would be necessary for the worker to be examined by the MRP. However, the MRP should retain the discretion to require the worker to be examined, notwithstanding the contrary determination by the Appeal Tribunal Panel. Refusal by the worker to attend a required MRP examination should have a direct consequence on the worker's entitlement to compensation benefits under the *Act*.

74. The determination made by the MRP would not be binding and conclusive on the Appeal Tribunal. Instead, the MRP's medical findings would be part of the overall medical evidence to be considered by the Appeal Tribunal Panel, which would determine how much weight should be placed on the MRP's findings.

75. The MRP should have the statutory discretion to determine its own medical procedures with respect to any referral made to it by the Appeal Tribunal, and to obtain any further medical information it may require in order to reach its determination. However, the MRP should not have the broad authority currently set out in Sections 61(4), (5) and (6) of the *Act*.

76. The legislation would specify that a worker who is to be examined by an MRP would not be entitled to attend with formal "representation" (which would not include a family member or close personal friend who attends the MRP examination with the worker), or to have any written submissions presented to the MRP on his /her behalf.

77. The legislation would require the MRP to provide written reasons which adequately respond to the questions raised by the Appeal Tribunal Panel.

78. The legislation would require the MRP to prepare, separate from its written reasons to the Appeal Tribunal, a narrative outlining any health matters the MRP discovers which are unrelated to the claim. The MRP would be required to send this additional narrative directly to the worker's treating physician. A copy of this additional narrative would not be provided by the MRP to the Appeal Tribunal or to the WCB.

79. Rather than set specific time limits within which the MRP must render its medical findings, the Appeal Tribunal should have the statutory mandate to ensure the timeliness of the MRP process.

80. The legislation would specify that the 180 day time frame, within which the Appeal Tribunal must render its decision with respect to the particular appeal before it, would be frozen from the date the Appeal Tribunal Panel determines it will refer a medical issue to the MRP, until the date that the MRP's medical findings are received by the Appeal Tribunal.

81. The MRP's written reasons (as well as any new medical information obtained by the MRP) would be provided by he Appeal Tribunal to the parties of interest in the appeal, who would then be provided a brief opportunity (of 7-10 days) to make any written submissions arising from the MRP's findings.

82. The legislation would specify that the Estate of a deceased worker has the standing to:

    (i) initiate or continue an appeal for compensation benefits on behalf of the deceased worker, or

    (ii) initiate an application for compensation benefits on behalf of the deceased worker.

83. The *Act* should provide that an initial application for compensation, brought to the WCB by the Estate of a deceased worker pursuant to Recommendation #82(ii) above, must be commenced within one year of the worker's death, with no discretion for the time frame to be extended.

84. In those cases where the *Act* provides an entitlement to compensation benefits to a dependant of a deceased worker, the legislation would specify that the Estate of a deceased dependant has the standing to:

    (i) initiate or continue an appeal for compensation benefits on behalf of the deceased dependant, or

SUMMARY OF RECOMMENDATIONS

(ii) initiate an application for compensation benefits on behalf of the deceased dependant, provided that the application is commenced by the Estate within one year from the date of the dependant's death.

SUMMARY OF RECOMMENDATIONS

RE: POLICY ISSUES

1. The Act should be amended to include a simple definition of the term "published policy", such as "any document or decision which is declared by the Board of Directors to constitute published policy".

2. The *Act* should be reviewed and wherever the phrase "the policies of the Governors" is used, it should be replaced with "the published policies of the Board of Directors".

3. The legislation should specifically state that the Appeal Tribunal must consider and apply the published policies of the Board of Directors which are applicable to the determination of the appeal before it.

4. Section 99 of the *Act* should be revised to clearly specify that all decision-makers within the WCB must, when determining the merits and justice of the case, consider and apply the published policies of the Board of Directors which are applicable to the matters before them.

5. The Policy Bureau should remain in existence. The *Act* should specifically acknowledge the responsibility of the Board of Directors for overseeing the operation of the Policy Bureau.

6. With respect to a particular appeal before it, where a Panel of the Appeal Tribunal identifies that

   (i) there are inconsistent published policies which may be applicable,

   (ii) there are multiple interpretations which may reasonably be given to the applicable published policies, or

   (iii) there is a gap in the published policies insofar as the particular appeal is concerned,

   the *Act* would require the Panel to decide the case before it on the basis of what the Panel determines the applicable published policies should state.

7. The *Act* would require the Chair of the Appeal Tribunal to provide written notice to the Chair of the WCB Board of Directors referring the policy issue, which was identified by the Appeal Tribunal Panel in its decision referred to in Recommendation #6 above, to the Directors for their consideration.

SUMMARY OF RECOMMENDATIONS

8. Pending any decision by the Board of Directors in response to the above referral from the Chair of the Appeal Tribunal, the legislation would specify that the existing published policies in question will continue to be applied by all of the decision-makers within the workers' compensation system.

9. When an issue concerning the lawfulness of a published policy of the WCB is initially identified with respect to an appeal before the Appeal Tribunal, the legislation should require that the matter be referred to the Chair of the Appeal Tribunal to decide how the "lawfulness" issue is to be determined.

10. The *Act* would require the Chair of the Appeal Tribunal to provide written notice to the Chair of the WCB Board of Directors of any Appeal Tribunal decision which determines that a published policy of the Board of Directors is in conflict with the *Act* or Regulations, and is therefore unlawful.

11. Within 60 days of receiving the written notice from the Chair of the Appeal Tribunal pursuant to Recommendation #10 above, the legislation would require the Board of Directors to take one of the following steps:

    (i) Confirm the Appeal Tribunal's decision that the applicable published policy is unlawful; or

    (ii) Refer the matter to the British Columbia Court of Appeal to determine the issue of the lawfulness of the applicable published policy.

12. Pending the decision by the Board of Directors with respect to which of the steps referred to in Recommendation #11 above it will take, the legislation would specify that any matter within the workers' compensation system whose determination requires the application of the impugned policy, including the particular case before the Appeal Tribunal which was the subject matter of the referral to the Board of Directors, would be held in abeyance.

13. If the Board of Directors confirms the decision of the Appeal Tribunal pursuant to Recommendation #11(i), the *Act* would specify that the impugned policy would no longer be applied by any decision-maker within the workers' compensation system. The failure of the Board of Directors to take any of the steps specified in Recommendation #11 above within the 60 day time period would be deemed in the legislation to constitute confirmation of the decision of the Appeal Tribunal.

14. If the matter is referred by the Board of Directors to the Court of Appeal pursuant to Recommendation #11(ii), all decision-makers within the workers' compensation system, including the Appeal Tribunal, would be required by the *Act* to continue to apply the impugned published policy from the date of the referral. The legislation would specify that the decision of the Court of Appeal is final and conclusive with respect to both the WCB and the Appeal Tribunal.

15. The *Act* should be revised to specify that the patently unreasonable standard of review must be applied by the Appeal Tribunal when considering whether a published policy of the WCB Board of Directors is unlawful pursuant to the provisions of the *Act* or Regulations.

16. Section 99 of the *Act* must be revised so as to be consistent with the following recommendations:

    (i) Certain decisions of the Appeal Tribunal, with respect to the issue as to whether a particular published policy of the Board of Directors is unlawful under the *Act*, may be "binding" on other decision-makers within the workers' compensation system; and

    (ii) The decision of the BC Court of Appeal, with respect to the issue as to whether a particular published policy of the WCB Board of Directors is lawful under the *Act*, will be "binding" on both the WCB and the Appeal Tribunal.

17. The *Act* should clearly specify that any new published policy approved by the Board of Directors of the WCB, or any change made by the Board of Directors to its existing lawful published policies, cannot be made effective to a date prior to the date on which the new or revised published policy was approved.

18. The existing published policy of the WCB concerning the effective date of a change in policy necessitated as a result of a finding of unlawfulness, as set out in Decision No. 36 of the Governors (1993), 9 WCR 147, should be retained as the published policy of the new Board of Directors.

SUMMARY OF RECOMMENDATIONS

RE: RECONSIDERATIONS/REOPENINGS

1. Subject to Recommendation #3 below, the WCB's existing power of reconsideration found in Sections 96(2) and 113(2) should be deleted from the *Act*.

2. The *Act* would specify that any decision of the WCB, including a decision rendered through the internal review process, is considered final and conclusive, subject to any specified avenue of appeal which may exist in the legislation, and should be protected from a court challenge by a privative clause similar to what is currently found in Section 96(1) of the *Act*.

3. The *Act* should be amended to provide:

   (i) A party of interest, who is aggrieved by a decision rendered by an initial decision-maker, would have the opportunity to request the WCB to reconsider the matter. The WCB would have the statutory discretion to determine whether or not to conduct such a reconsideration.

   (ii) The WCB's authority to reconsider the decision of the initial decision-maker, pursuant to sub-paragraph (i) above, would cease upon the earlier of:

   (a) The expiry of 75 days from the date that the decision by the initial decision-maker was communicated, in writing, to the affected parties, or

   (b) the date that the aggrieved party of interest applies for an internal review of the disputed decision.

   (iii) In the circumstances where the WCB either:

   (a) refuses to conduct a reconsideration of the initial decision, or

   (b) fails to render its reconsideration decision within 75 days of the date the disputed decision was communicated, in writing, by the initial decision-maker to the affected parties, or

   (c) renders its reconsideration decision confirming the initial decision,

   the aggrieved party's application for internal review must be commenced within the 90 day period from the day that the disputed decision of the initial decision-maker was communicated to him/her.

(iv) If upon reconsideration the WCB makes any revision to the disputed decision, then the 90 day time frame to apply for an internal review would commence from the date that the WCB's reconsideration decision letter was communicated, in writing, to the affected parties.

4. The WCB would have the statutory authority to conduct a "reinquiry" into a previous decision in the following circumstances:

(i) An application for a reinquiry could only be made by a party with respect to a final decision rendered by the WCB/appellate system (ie: after all the available appellate steps have been completed or, in the case where an available level was not utilized, after the applicable time limit for commencing the appeal has elapsed).

(ii) A prerequisite for having the WCB conduct a reinquiry of a previous final decision would be the presentation by the applying party of new evidence which has a substantial and material impact on the previous decision.

(iii) The application for reinquiry would be made to the initial decision-making level of the applicable Division of the WCB.

(iv) The initial decision-maker would have to determine the following two issues with respect to an application for reinquiry:

(a) Has new evidence been presented which has a substantial and material impact on the previous decision?

(b) If yes, then the initial decision-maker would have to consider the merits of the application for reinquiry – should the result of the previous decision be revisited based upon the new evidence which has been presented?

(v) If the previous decision is ultimately changed as a result of an application for reinquiry, the change would be effective only from the date the party's application for reinquiry was submitted to the WCB.

(vi) A party would be entitled to apply for a reinquiry, pursuant to the above principles, with respect to any previous decision rendered within the workers' compensation system (ie: regardless as to whether the previous decision was rendered before or after the effective date of the anticipated new legislation).

5. In order to deal with an abuse of its adjudicative processes arising from repetitive requests for a reinquiry, the legislation must provide the WCB with the authority to ultimately determine that it will not accept any further applications for reinquiry from a specified party with respect to a particular decision. The following conditions shall apply with respect to such a determination made by the WCB.

(i) The determination that the WCB will not accept any further applications for reinquiry from a specified party must be made by the President of the WCB (or, in the President's absence, his/her delegate).

(ii) The President shall determine whether the refusal to consider further applications for reinquiry, pursuant to sub-paragraph (i) above, will be for a specified or indefinite period of time.

(iii) The President's determinations under sub-paragraphs (i) and (ii) above are final and conclusive, and therefore are not subject to any review or appeal within the workers' compensation system.

6. The *Act* must continue to allow an accepted claim to be reopened when there has been a significant change in the worker's compensable condition since the time of the original injury. An application for reopening would continue to be treated by the WCB as a new matter for adjudication under the *Act*.

SUMMARY OF RECOMMENDATIONS

RE: SCOPE AND COVERAGE

1. The principle of universal workers' compensation coverage for workers and employers in BC should be retained.

2. Section 2(1) of the *Act* should be amended to specifically provide the Board of Directors of the WCB with the exclusive authority to grant exemptions to employers or workers from mandatory coverage under the *Act*.

3. Any existing exemptions granted by the Board of Directors should be listed in a Schedule attached to the *Act*.

SUMMARY OF RECOMMENDATIONS

RE: BENEFITS

1. Temporary and permanent compensation benefits paid pursuant to the *Act* should be based on net, rather than gross, earnings.

2. The legislation would specify that net earnings are calculated by deducting the following items from the worker's gross earnings:

    (i) the worker's probable Employment Insurance contribution for those earnings;

    (ii) the worker's probable Canada Pension Plan contributions for those earnings; and

    (iii) the probable amount of the worker's Federal and Provincial income tax for those earnings.

3. The following concepts, with respect to the WCB's administration of the net earnings system, should be incorporated into a Regulation enacted pursuant to the *Workers' Compensation Act*:

    (i) The amount of the CPP and EI deductions to be made, and the income tax rate to be applied, are to be determined solely by reference to the gross employment earnings of the worker, up to the maximum earnings level specified in the *Act*. No consideration would be given to the actual amount of the CPP and EI contributions paid by the worker, nor to the actual tax rate applicable to that worker.

    (ii) The calculation of a worker's net earnings would be based on the income tax rates and the level of CPP and EI deductions that were in effect as of December 31st of the previous year. Accordingly, any changes made to the Federal or Provincial tax system, or to the level of CPP or EI contributions, during a calendar year would not be taken into account until January 1st of the following year.

    (iii) In determining the probable Federal and Provincial income tax rates for the worker, the following tax credits would be attributed to each disabled worker:

        (a) tax credits based on 1.5 times the basic personal exemption as of December 31st of the previous year, and

        (b) tax credits for the CPP and EI contributions attributed to the worker pursuant to sub-paragraphs (i) and (ii) above.

    (iv) A disabled worker's net earnings would be redetermined by the WCB effective January 1st of each year, based upon the principles set out in sub-paragraphs (i), (ii) and (iii) above.

SUMMARY OF RECOMMENDATIONS

4. The *Act* should be amended to include the following provision:

> The WCB shall, on January 1st of each year, establish a schedule setting out a table of net earnings determined in accordance with the Regulation (referred to in Recommendation #3 above). The schedule established by the WCB shall be final and conclusive.

5. The compensation rate specified in the *Act*, for providing temporary and permanent benefits to disabled workers in BC, should be based on 90% of the worker's net average earnings.

6. Section 22(2) of the *Act* should be amended to provide that compensation awarded in the case of a permanent total disability must not be less than an amount equal to that which a worker would earn at the minimum wage established in the Province, working 40 hours per week.

7. Section 23(4) of the *Act* should be revised to read:

> Where permanent partial disability results from the injury, the minimum compensation awarded must be calculated in the same manner as prescribed by Section 22(2) for permanent total disability, but to the extent only of the partial disability.

8. Section 29(2) of the *Act* should be amended to provide that the compensation awarded in the case of a temporary total disability must not be less than an amount equal to that which a worker would earn at the minimum wage established in the Province, working 40 hours per week, unless the worker's average net earnings are less than that sum per week, in which case the worker must receive compensation in the amount equal to the worker's average net earnings.

9. The WCB should

   (i) remove Section #37.21 from the Claims Manual, and

   (ii) apply the statutory minimum to all permanent pension awards, whether calculated pursuant to Section 22, 23(1) or 23(3) of the *Act*.

10. The maximum (gross) wage rate under Section 33 of the *Act* should be adjusted annually, as of January 1st, 2003 and each subsequent January 1st, to an amount equal to 190% of the average industrial wage in BC for the calendar year which ended a year and a day earlier.

11. Section 5(2) of the *Act* should not be revised:

    (i) to provide for a waiting period beyond the day of the compensable injury, nor

    (ii) to require an employer to pay an injured worker full wages for the day on which a compensable injury occurs.

12. Section 25 of the *Act* should be amended to provide that periodic payments of compensation made under the *Act* should be adjusted on an annual basis based

upon the formula of "CPI less 1%". Such adjustments are not to be more than 4%, nor less than 0%. This new CPI formula would apply prospectively to all existing claims for compensation benefits which are being paid by the WCB, as well as to any future claims for compensation benefits.

13. The *Act* should be amended to provide that CPP disability benefits be integrated with the workers' compensation permanent disability benefits which are payable as a result of the same injury or occupational illness, but only to the extent of the employer's percentage of the overall contribution to CPP.

14. Workers' compensation benefits should not be reduced by, or integrated with, any supplementary benefits paid through privately arranged or purchased insurance, or through private arrangements whereby an employer pays "top-up" benefits to the worker.

15. The *Act* should be amended to provide the following:

    (i) Subject to sub-paragraphs (iii), (iv) and (v)(c) below, any temporary wage loss benefits to which a disabled worker is entitled for the initial period of 10 weeks from the date of injury shall be based upon the actual rate of pay earned by the worker on the date of his/her injury.

    (ii) The WCB shall be required to conduct a wage-rate review to determine the average earnings for those workers covered by sub-paragraph (i) above who have received temporary wage-loss benefits for a period of 10 weeks from the date of injury.

    (iii) The actual rate of pay on the date of injury, as referred to in sub-paragraph (i) above, shall not be used to determine a casual worker's entitlement to temporary wage loss benefits. Instead, the average earnings of the casual worker shall be used as the basis for determining the wage rate for the purpose of providing compensation benefits to the casual worker from the date of his/her injury.

    (iv) The average earnings of a person entitled to Personal Optional Protection under the *Act* are the earnings for which coverage has been purchased, and shall be used as the basis for determining the wage rate for the purpose of providing compensation benefits to the person from the date of his/her injury.

    (v) The WCB should retain the authority to develop and implement published policies with respect to the determination of:

        (a) the actual rate of pay on the date of injury for different categories of workers, as specified by the WCB;

        (b) the types and characteristics of workers who would be considered as "casual" for the purposes of receiving compensation benefits under the *Act*; and

(c) the wage rate to be attributed to a worker covered by the *Act* who had no earnings on the day of his/her injury.

16. The *Act* should be amended to provide that, subject to the exceptions specified in Recommendations #17, 18 and 19 below, the average earnings of a disabled worker shall be calculated based upon the gross earnings of the worker (up to the maximum earnings specified in the *Act*) during the 12 month period prior to the date of the worker's compensable injury, disablement from occupational disease or death.

17. Notwithstanding Recommendation #16 above, the average earnings of a worker, who is a learner or apprentice in a trade, occupation or profession at the time of his/her injury, disablement from occupational disease or death, shall be based on the gross average earnings, during the 12 month period prior to the date of the worker's injury, disablement or death, of a qualified person employed at the beginner rate in the same trade, occupation or profession by the same employer or, where there is no person so employed, of a qualified person employed at the beginner rate in the same trade, occupation or profession in the same locality or region.

18. Notwithstanding Recommendation #16 above, the average earnings of a worker who was in the employment of his/her employer, other than on a casual or temporary basis, for a period of less than 12 months as of the date of the worker's injury, disablement from occupational disease or death, shall be based on the gross average earnings, during the 12 month period prior to the date of the worker's injury, disablement or death, of a person of similar status employed in the same grade or class of employment by the same employer or, where there is no person so employed, of a person of similar status employed in the same grade or class of employment in the same locality or region.

19. Notwithstanding Recommendation #16 above, the WCB must be provided with the discretion to deal with those extenuating circumstances when the calculation of the worker's average earnings, based on the preceding 12 month period, would, as determined by the WCB, produce an inequitable result. In such extenuating circumstances, the WCB would calculate the worker's average earnings based on the amount which, as determined by the WCB, reflects the loss of the worker's probable earning capacity, as a result of the worker's injury, disablement from occupational disease or death.

20. The *Act* should be amended to include Employment Insurance benefit payments in the calculation of the average earnings for those workers who receive such payments due to being employed in an occupation or industry which, as determined by the WCB, is expected to result in recurring seasonal or temporary interruptions of the worker's employment.

21. The *Act* should be amended to include the following provisions:

    (i) The cost of the employer's contributions for fringe benefits provided to a worker, including contributions to the Canada Pension Plan, Employment Insurance, retirement, pension, health and welfare, life insurance and other employee or dependant benefit plans, shall not be included as a component in calculating the average earnings of the worker.

(ii) Subject to sub-paragraph (iii) below, an employer must continue to make premium contributions to a pension, life insurance or other health and welfare benefit plan in respect of a disabled worker until the earlier of:

(a) the expiry of a period of 12 months from the date of the worker's compensable injury or disablement from occupational disease, or

(b) the date the worker is no longer entitled to receive disability compensation benefits from the WCB arising from a compensable injury or disablement from occupational disease.

(iii) The employer shall be required to make the premium contributions referred to in sub-paragraph (ii) above only in the event that

(a) the employer was making the premium contributions on behalf of the disabled worker on the date when the compensable injury or disablement from occupational disease occurred, and

(b) the disabled worker continues to pay his/her share of the premium contributions, if any, during the period specified in sub-paragraphs (ii)(a) or (b) above.

22. The *Act* should be amended to include the following provision:

> The average earnings do not include any sum paid to the worker for special expenses, as determined by the WCB, incurred because of the nature of the work.

SUMMARY OF RECOMMENDATIONS

RE: OCCUPATIONAL DISEASES

1. Occupational diseases which are due to the nature of the worker's employment should continue to be covered under the *Act*.

2. Subject to the refinements to Section 6(3) and Schedule B of the *Act* proposed below, the existing methods of recognizing an occupational disease for compensation purposes, as identified in the definition of "occupational disease" in Section 1 and in Section 6(4)(b), should be maintained.

3. The *Act* should provide for the apportionment of compensation entitlement based upon the portion of the worker's disease which was causally related to occupational, as opposed to non-occupational, factors.

4. Once it is determined that occupational factors had causative significance with respect to the development of the worker's disease, the legislation would specify four levels of apportionment between occupational and non-occupational factors:

Percentage Attributed to Occupational Factors	Percentage Attributed to Non-Occupational Factors
25%	75%
50%	50%
75%	25%
100%	0%

5. The *Act* would specify that the standard for determining whether an occupational or non-occupational factor played a role in the development of the worker's disease is based on "causative significance". If the occupational factors did have causative significance, then the worker would receive a minimum apportionment of 25% of whatever compensation benefits he/she was otherwise entitled to under the *Act*. The actual apportionment level applicable to that worker would depend on whether there were any non-occupational factors which were also found to have had causative significance in the development of the worker's disease.

6. The *Act* should provide:

   (i) The applicable level of apportionment would be applied to any entitlement the worker may have under the *Act* to either temporary wage loss payments or a permanent pension award arising from his/her occupational disease.

   (ii) The WCB should be responsible for the payment of 100% of the costs of health care benefits which are allowed under the *Act*, once it is determined that occupational factors had causative significance, to some degree, in the development of the worker's disease.

   (iii) There should be no apportionment with respect to any vocational rehabilitation services that the worker may receive from the WCB once it is determined that occupational factors had causative significance, to some degree, in the development of the worker's disease. However, any wage loss/income continuity component associated with the provision of vocational rehabilitation services would be apportioned in the same manner as temporary wage loss payments.

7. The current economic test for occupational diseases, as set out in Section 6(1)(a) of the *Act*, should remain in the legislation.

8. The WCB should revise its published policies to clarify that once a disabled worker has established entitlement, pursuant to Section 6(1) of the *Act*, to receive temporary wage loss benefits from the WCB, there is no requirement for the worker to have to re-establish that entitlement pursuant to Section 6(1) prior to receiving any pension award to which he/she may otherwise be entitled to under Section 22 or 23 of the *Act*.

9. Schedule B should be maintained as part of the *Workers Compensation Act*.

10. The requirement in Section 6(3), for the worker to be employed in the specified process or industry "at or immediately before the date of disablement", should be amended to expressly incorporate a long latency period which is known to exist between exposure and onset of the particular disease listed on Schedule B.

11. Schedule B should be revised, with respect to those diseases in it which are known to have a long latency period, so as to specify the maximum length of time that the worker could have been away from the identified process or industry in order for the Section 6(3) presumption to still be applicable.

12. The concluding words "unless the contrary is proved" should be deleted from Section 6(3).

13. Once it is determined that Section 6(3) is applicable to a worker, the legislation would specify that the worker is entitled to receive the minimum 25% apportionment of whatever compensation benefits he/she was otherwise entitled to under the *Act*. The actual apportionment level applicable to the worker would depend on whether there were any other non-occupational factors which were also found to have had causative significance in the development of the worker's disease.

14. The WCB should review the terminology used throughout Schedule B to ensure there is a consistent description of what period of time and/or degree of exposure or contact is required in regard to a specified substance or process. Furthermore, if different terminology is used in Schedule B (such as "prolonged" and "excessive"), then the WCB should develop the appropriate published policy to provide a clear explanation of the meaning to be attributed to each term.

15. The Board of Directors of the WCB should retain the authority to add, amend or delete items from Schedule B.

16. The legislation should require that any additions, amendments or deletions made to Schedule B by the Board of Directors must be gazetted prior to taking effect.

17. The *Act* should require the WCB to conduct a comprehensive review of each Item in Schedule B on a regular basis, and in any event at least once every 10 years.

SUMMARY OF RECOMMENDATIONS

RE: CHRONIC STRESS

1. The legislation should be amended to provide that psychological impairment caused by mental stimuli (ie: where no sudden traumatic workplace event has occurred) will be compensable under Part 1 of the *Act* under the following conditions:

   (i) The claimant's condition is medically recognized as an acknowledged psychological impairment;

   (ii) The stressors leading to the claimant's psychological impairment are objectively verifiable and are excessive or unusual in comparison with the stressors which are reasonably associated with the same type of employment as the claimant's;

   (iii) The stressors leading to the claimant's psychological impairment are not related to personnel actions or decisions, when taken or made in good faith, such as those involving labour relations or employment issues, workplace reorganizations or relocations, changes in the work to be performed or in the working conditions, disciplinary actions, demotions, transfers, promotions, layoffs or terminations; and

   (iv) The work-related stressors identified in subparagraph (ii) above must be the predominant cause of the claimant's psychological impairment.

SUMMARY OF RECOMMENDATIONS

RE: PENSIONS

1. Subject to Recommendations #5 and #14 below, the Dual System of calculating pension entitlement in BC, as provided for in Sections 23(1) and 23(3) of the *Act*, should be retained. However, the emphasis of the published policies must be placed upon utilizing the loss of function method when determining the pension entitlement of a permanently disabled worker. The loss of earnings method should only be used in those "special instances" when the pension award calculated pursuant to the loss of function method is considered to be significantly inadequate insofar as the individual worker's particular circumstances are concerned.

2. The payment of compensation benefits for permanent impairment, based on the "actual loss of earnings" method and the provision of a "non-economic loss" benefit, should not be adopted in the BC legislation.

3. The WCB should conduct a review of the existing Permanent Disability Evaluation Schedule ("PDES") to ensure it is reflective of current medical/scientific knowledge, and can be readily understood by the decision-makers who must utilize it.

4. Section #39.10 of the WCB's Rehabilitation Services and Claims Manual should be revised to require all decision-makers within the workers' compensation system to apply the applicable percentage (or range of percentages) when the specified physical or psychological impairment under consideration is listed on the PDES.

5. The Board of Directors of the WCB must revisit the intent and application of Section 23(3) of the *Act*, and redefine those "equitable" circumstances when the loss of earnings method of pension assessment should, and should not, be utilized within the BC workers' compensation system.

6. Subject to recommendation #7 below, the *Act* would specify that any pension award provided to a disabled worker under the loss of function or loss of earnings method would cease upon the worker attaining the standard age of 65, unless that worker can establish that his/her retirement would in fact have occurred at a date later than at age 65 (in which case the worker's entitlement to a pension award would cease at that later date).

7. Notwithstanding Recommendation #6 above, where the worker is age 63 or older on the date of his/her injury or disablement from an occupational disease, the legislation should provide that any pension entitlement that the worker may have under the Dual System would continue for a period of 2 years from the date of the worker's injury or disablement.

SUMMARY OF RECOMMENDATIONS

8. The *Act* would specify the following:

(i) The WCB must set aside an additional amount equal to 5% of each payment to the worker of any pension award calculated pursuant to the Dual System. The amount set aside shall be paid out to the worker as a post-retirement benefit once the worker's pension entitlement ceases pursuant to Recommendation #6 or #7 above.

(ii) A permanently disabled worker would be entitled to elect to make contributions to his/her post-retirement benefit in the amount of 1 to 5% of any pension award provided to the worker under the Dual System. The percentage specified by the worker would be withheld by the WCB from each payment of the worker's pension award, and would be paid out once the worker's pension entitlement ceases pursuant to Recommendation #6 or #7 above.

(iii) There would be no specified time frame within which the worker must make the election to contribute to his/her post-retirement benefit pursuant to sub-paragraph (ii) above. Once the election is made, the contribution would be withheld prospectively by the WCB from each pension payment provided to the worker.

(iv) The worker's election to make contributions to his/her post-retirement benefit at a specified percentage would be irrevocable, with one exception. The worker would be entitled to change his/her mind and decide not to make any further contributions. However, any decision by the worker to cease making the contributions would be irrevocable.

(v) The WCB would be required to maintain the post-retirement amount it sets aside on behalf of a permanently disabled worker, as well as any contributions made by the worker, in a fund or reserve separate from the Accident Fund. This separate fund or reserve may, with the approval of the Board of Directors of the WCB, be administered by a recognized financial institution.

(vi) The WCB (or any recognized financial institution approved by the Board of Directors pursuant to sub-paragraph (v) above) must provide an annual statement to a permanently disabled worker setting out the following information concerning the post-retirement benefit which is being accumulated on his/her behalf:

(a) the amount set aside by the WCB in the worker's name in that year;

(b) the amount contributed by the worker in the year, if any,

(c) the accumulated investment income earned on the amounts referred to in clauses (a) and (b) in the year;

(d) the date when the worker will become entitled to receive the post-retirement benefit; and

(e) such other information as the WCB considers appropriate.

(vii) In the event a permanently disabled worker dies before his/her post-retirement benefit becomes payable, the accumulated amount of the post-retirement benefit would be paid by the WCB to the worker's estate. (If the applicable laws would permit the worker to designate a beneficiary to receive the worker's post-retirement benefit, then the worker would be entitled to designate whomever he/she wishes to receive the accumulated post-retirement benefit in the event of the worker's death.)

9. The WCB should consider what guidance, by way of published policy, can be given to decision-makers within the workers' compensation system with respect to when, and how, to take into account the non-compensable personal characteristics of a disabled worker (ie: age, language skills and educational background) in determining the worker's entitlement to a loss of earnings pension pursuant to Section 23(3) of the *Act*.

10. Section 23 of the *Act* should be revised to require the WCB to develop, implement and maintain a permanent impairment rating schedule to be used solely to determine the impact on a worker's earning capacity as a result of chronic pain arising from a compensable injury or illness. The permanent impairment rating would cover the chronic pain experienced by the worker, as well as any other related condition suffered by the worker arising from his/her chronic pain. The *Act* should also specify that the maximum percentage of impairment of earning capacity arising from the worker's chronic pain, including any other related conditions arising from the worker's chronic pain, would be 20%.

11. The permanent impairment rating schedule, to be developed by the WCB pursuant to Recommendation #10 above, should include the following features:

    (i) The schedule should contain either three or four levels of permanent impairment to a worker's capacity arising from chronic pain. The levels must be objectively distinguishable from each other.

    (ii) The WCB will be required to quantify the estimated percentage of permanent impairment of earning capacity for each level of impairment.

    (iii) The difference in the percentage of permanent impairment for each level must be sufficiently large so as to objectively distinguish one level from another.

12. In determining a permanently disabled worker's overall entitlement to a loss of function pension award, the WCB would consider the following two components of the worker's impairment of earning capacity:

(i) the percentage of impairment associated with any objective permanent physical or psychological impairment arising from the worker's compensable injury or illness, and

(ii) the percentage of impairment associated with the chronic pain experienced by the worker arising from his/her compensable injury or illness.

The above percentages would be combined to determine the worker's overall loss of function award. In no circumstances would the worker be entitled to receive more than the maximum compensation payable under the *Act*.

13. The percentage of impairment of earning capacity determined by the WCB for any objective permanent physical or psychological impairment (whether or not listed on the PDES), arising from the worker's compensable injury or illness, should not include any component for the expected level of pain associated with the particular impairment. Instead, the percentage of permanent impairment of the worker's earning capacity arising from his/her chronic pain, if any, would be separately evaluated pursuant to the rating schedule to be developed by the WCB as per Recommendation #10 above.

14. The full amount of the worker's pension entitlement, if any, for his/her chronic pain, arising from a compensable injury or illness, would be determined pursuant to the rating schedule to be developed by the WCB as per Recommendation #10 above. Accordingly, Section 23 of the *Act* should specifically provide that, once the WCB has developed and implemented its rating schedule for chronic pain, the worker would not be entitled to be assessed for a projected loss of earning pension award, pursuant to Section 23(3), arising from his/her chronic pain or from any other related condition arising form the worker's chronic pain.

15. Although the projected loss of earnings method in Section 23(3) would not apply to the worker's complaints of chronic pain, the WCB would still be required, pursuant to its existing published policies, to consider the Dual System with respect to any objective permanent physical or psychological impairment which the worker may have suffered as a result of his/her compensable injury or illness. The worker would still be entitled to receive the higher of the loss of function pension assessment (composed of the two components set out in Recommendation #12 above) and the projected loss of earnings pension assessment.

16. There should be no amendment made to Section 35(2) of the *Act* nor changes made to the existing published policies of the WCB regarding commutations of permanent disability awards provided to disabled workers, subject to Recommendation #17 below.

17. Section #45.20 of the Claims Manual should be revised by the WCB so as to delete the existing exclusion of the commutation principles from any projected loss of earnings pension calculated pursuant to Section 23(3) of the *Act*.

18. Any commutation of a worker's permanent disability award must take into account the additional amount of 5% that the WCB would have set aside as the worker's post-retirement benefit, as per Recommendation #8(i) above.

SUMMARY OF RECOMMENDATIONS

RE: SURVIVOR BENEFITS

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1. The calculation of pension entitlement for surviving spouses and other dependants under Section 17 of the _Act_ should continue to be calculated as a percentage of the pension the deceased worker would have received had he or she sustained permanent total disability.

2. Subject to Recommendation #7 below, the present level of benefits payable under Sections 17(3)(a), (b) and (f) are appropriate, and no change is recommended.

3. No change should be made to the minimum benefit levels set out in Sections 17(c) and (g).

4. Subject to Recommendation #7 below, no change should be made to the existing level of benefits payable to an "invalid" spouse pursuant to Section 17(3)(c).

5. With respect to childless, non-invalid, dependent surviving spouses, the _Act_ should be amended to specify that

   (i) those spouses age 50 and older at the time of the worker's death would receive 60% of the monthly amount which would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability; and

   (ii) those spouses below age 50 at the time of death would receive 1% less than 60% for each year of age below 50 to a minimum of 30%.

6. The following words should be deleted from the existing definition of "federal benefits" in Section 17(1) of the _Act_:

   > . . ., together with any benefits to which the dependent spouse is or becomes entitled under the *Canada Pension Plan* as a result of having retired or reached retirement age.

7. The _Act_ should provide that CPP survivor benefits are integrated with the workers' compensation fatality benefits which are payable as a result of the same death, but only to the extent of the employer's percentage of the overall contribution to CPP.

8. The _Act_ would specify that the fatality benefits paid to surviving dependent spouses and/or children would cease no later than as of the date when the worker would have reached the age of 65 (or, in the case where the worker was 63 years or older on the date of his/her death as a result of an occupational injury or disease, no later than 2 years after the date of the worker's death).

9. The _Act_ should require the WCB to accumulate an additional amount equal to 5% of each pension payment which is allocated to a surviving dependent spouse. This "post-retirement benefit" amount would become payable to the surviving spouse once his/her entitlement to survivor benefits under the _Act_ ceases pursuant to

Recommendation #8 above. (All of the recommendations concerning the post-retirement benefit accumulation for, and payment to, a permanently disabled worker, as set out in the "Summary of Recommendations re: Pensions", would be equally applicable to the post-retirement benefit being accumulated for the surviving dependent spouse.)

10. In determining the amount of the pension benefits payable to surviving dependent spouses and/or children where the worker's death is causally related to an occupational disease, the _Act_ would require the WCB to apply the apportionment approach in calculating the amount of permanent total disability pension award that would have been payable to the deceased worker had he/she sustained a permanent total disability.

11. Once it is determined that the "conclusive presumption" in Section 6(11) of the _Act_ is applicable, the legislation would specify that the surviving dependants are entitled to receive fatality benefits based upon the minimum 25% apportionment of the amount that would otherwise have been payable had the worker sustained a permanent total disability. The actual apportionment level applicable to the surviving dependants' entitlement to fatality benefits would depend on whether there were any non-occupational factors which were also found to have had causative significance in the development of the worker's disease which led to his/her death.

12. The _Act_ should be revised to specify that fatality benefits for economic loss will not be paid to any surviving dependant of a deceased worker whose work-related disability did not arise until after the worker had retired from employment.

13. The _Act_ should provide a lump sum payment equal to $45,000 to a surviving spouse aged 50 years or older at the time of the worker's death, and would be increased by $1,000 for each year the spouse is younger than 50 years, to a maximum of $75,000.

14. The $45,000 amount specified in Recommendation #13 above would be periodically adjusted for changes in the consumer price index (pursuant to Section 25 of the _Act_).

15. In the case of a worker's death arising from an occupational death, the legislation would specify that there be no apportionment of the lump sum payment provided to the surviving spouse pursuant to Recommendation #13 above.

16. The _Act_ should provide that the lump sum benefit, referred to in Recommendation #13 above, would be payable to a surviving spouse of a deceased worker whose work-related disability did not arise until after the worker retired from employment.

17. Section 17(13) should be deleted from the _Act_.

18. The _Act_ would require any fatality benefits paid to persons, other than surviving spouses and/or children, to cease no later than as of the date when the worker would have reached the age of 65 (or, in the case where the worker was 63 years or older on the date of his/her death as a result of an occupational injury or disease, no later than 2 years after the date of the worker's death).

SUMMARY OF RECOMMENDATIONS

19. In the case of a worker's death arising from an occupational disease, the Act would specify that there be no apportionment of the funeral expenses, incidental expense and/or any additional transportation costs paid by the WCB pursuant to Section 17(2) of the Act.

20. The reference in Section 17(3)(i) of the Act to the duration of the benefit payment will have to be revised to be in accordance with Recommendation #18 above.

21. The reference at the end of Section 17(16) of the Act to "or more than 75% of the amount referred to in Section 33(6)" must be revised to reflect the calculation of benefit entitlement based upon "90% of net earnings".

22. The following numbered Recommendations made by the Royal Commission are adopted as recommendations in this Report:

    - The Royal Commission's *Interim Report* Recommendations #56, 57, 58, 60 (subject to the application of Recommendation #18 set out above), 61, 62, 63, 64, 65 and 66.

    - The Royal Commission's *Final Report* Recommendation #159.

SUMMARY OF RECOMMENDATIONS

RE: VOCATIONAL REHABILITATION

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1. The WCB must retain its discretionary authority, pursuant to Section 16(1) of the _Act_, to determine what vocational rehabilitation ("VR") services are to be provided by the WCB, who will be eligible to receive any of the VR services provided by the WCB, and the nature and extent to which such services will be provided to any particular disabled worker.

2. Section 16(1) of the _Act_ should be amended to enunciate the following four statutory principles concerning the provision of VR services by the WCB to disabled workers:

   (i) VR services should be provided to those disabled workers whom the WCB determines require VR assistance in order to maximize their long-term earnings capacity, up to the level of the worker's pre-injury earnings (and subject to the maximum earnings level prescribed by the _Act_).

   (ii) The primary objective of the VR services provided to a disabled worker is to return him/her to actual employment with the pre-injury or another employer. In the event the WCB determines that this objective cannot be reasonably achieved, the final objective will be to seek to enhance the worker's employability for suitable and reasonably available employment which would maximize the worker's earnings capacity in the long run, up to the level of the worker's pre-injury earnings.

   (iii) Early intervention is a necessary factor in the delivery by the WCB of effective VR services to disabled workers.

   (iv) There is a necessity for mutual collaboration and cooperation between the WCB and the disabled worker if the WCB's VR efforts on behalf of the worker are to be successful.

3. The WCB should develop an appropriate process to ensure that a disabled worker's need for quality VR services is detected and provided at an early stage of the compensation process. If the WCB Case Manager had not previously considered whether any VR services should be provided to the disabled worker, then such consideration should be given as part of the Case Manager's overall 10 week review of the worker's claim file.

4. The WCB should develop guidelines around deeming so that it becomes more of an objective process. Such guidelines should include:

   (i) The deeming process should never be utilized while the worker is actively participating in any of the first four sequential phases in the WCB's VR process, which are all focused on returning the worker to actual employment (with either the pre-injury or another employer).

   (ii) The purpose of the fifth (and final) phase of the WCB's VR process is the development of new occupational skills for the worker once the WCB determines that the placement of the worker into actual employment cannot reasonably be achieved. The WCB must first determine the level to which it has enhanced the worker's employability before it can reasonably finalize the long term employability prospects of the worker for deeming purposes.

5. If, after fully considering all of the applicable factors, the WCB determines that it is reasonable for the disabled worker to relocate in order to obtain alternate employment, then the WCB must have the authority to require the worker to do so. If the worker refuses to relocate in such circumstances, then the WCB would be entitled to base the level of the worker's loss of earnings pension (pursuant to Section 23(3)) as if the worker had relocated in order to obtain the alternate employment.

6. The published policies of the WCB should only require the disabled worker to relocate from his/her current community when

   (i) all reasonable options regarding suitable alternate employment opportunities, which are within a reasonable commuting distance from the worker's home, have been exhausted; and

   (ii) there is a substantial likelihood that the worker will obtain alternate employment, which will maximize his/her long term earnings capacity, within a reasonable time frame from the date of the worker's relocation.

7. The WCB should retain its existing published policy that relocation will not normally be expected unless the worker is offered the expenses of relocation by the WCB or some other government agency.

8. The *Act* should be revised as follows:

   (i) The scope of review should be limited, pursuant to sub-paragraphs (ii) and (iii) below, with respect to any VR decision made by the WCB, including

      (a) who is eligible to receive any VR services or expenditures from the WCB,

      (b) which VR services provided by the WCB should any individual disabled worker receive, and

      (c) the extent of any VR services or expenditures provided by the WCB to any individual disabled worker.

   (ii) Any application for internal review, with respect to any VR determination, must be based on the following grounds of review:

      (a) error of fact which had a substantial and material impact on the decision reached by the initial decision-maker, or

      (b) error of law, or

      (c) contravention of a published policy of the Board of Directors.

SUMMARY OF RECOMMENDATIONS

(iii) The decision rendered by the internal review process, with respect to any VR determination, shall be final and conclusive. No further appeal can be brought from the internal review process to the external Appeal Tribunal.

9. Any deeming decisions, which relate to the worker's level of entitlement to a loss of earnings pension under Section 23(3) of the *Act*, would be subject to the broader substitutional standard of review at both the internal review and the external Appeal Tribunal levels.

10. The *Act* should not be amended to specify either

    (i) a duty on an employer to mandatorily re-employ a worker who is disabled by a compensable injury or disease, or

    (ii) a duty on a disabled worker to take all reasonable steps to mitigate his/her loss arising from the compensable disability.

11. No changes should be made to the discretionary authority provided to the WCB in Sections 16(2) and (3) of the *Act*.

12. The scope of review, with respect to any VR decision made by the WCB concerning the eligibility, nature and extent of VR services provided to surviving dependants pursuant to Sections 16(2) and (3) of the *Act*, should be limited in the same manner as set out in Recommendation #8 above.

13. The WCB should revise Section #91.20 of the Claims Manual to reflect its practice of offering grief counselling services to surviving spouses and dependants in every fatality claim.

SUMMARY OF RECOMMENDATIONS

RE: FUNDING THE SYSTEM

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1. Relief of costs pursuant to Section 39(1)(e) should be retained in the *Act* as it currently exists.

2. Subject to Recommendation #5 below, the existing published policy of the WCB, requiring the mandatory consideration of the application of Section 39(1)(e) after a specified time frame, should be maintained.

3. The WCB must revise its existing published policies to require the mandatory relief of costs review, pursuant to Section 39(1)(e) of the *Act*, to be conducted after the worker has been in receipt of temporary wage loss benefits for a period of 10 weeks from the date of injury.

4. The WCB should revise its published policies to provide:

    (i) The claims costs associated with a compensable back injury to a worker would be charged to the affected employer, for experience rating purposes, only for the initial 10 week period from the date of the worker's injury.

    (ii) Any claims costs associated with a compensable back injury to a worker, after the initial 10 week period referred to in point (i) above, will be excluded from the overall claims costs used to determine the affected employer's experience rated assessment.

    (iii) All of the claims costs associated with a compensable back injury to a worker will be charged to the affected employer's Rate Group.

5. Section 39(1)(e) of the *Act* should be revised to specifically exclude relief of costs with respect to any compensable back injuries suffered by workers.

6. Section 177 should be moved to Part 1 of the *Act* in order to apply to all employers who are covered by the mandatory compensation scheme provided under the *Act*.

7. Consideration should be given to whether the ambit of the prohibition in Section 177 of the *Act* should be broadened to protect other related activities on the part of workers – such as the making or pursuing of an application for compensation under Part 1 of the *Act*.

8. Section 47(2) of the *Act* should be revised to provide for a consistent and fair additional assessment to be levied on any employer who fails to register with the WCB, regardless as to whether or not one of the employer's workers has suffered an occupational injury or disease during the period of default.

9. Section 51 should be deleted from the *Act*. Consideration should be given to finding other alternatives in order to allow the WCB to achieve the benefits otherwise gained through Section 51.

SUMMARY OF RECOMMENDATIONS

10. The WCB should conduct a comprehensive review of the published policies in the Assessment Policy Manual to ensure they are readily understandable to

    (i) the WCB decision-makers who must interpret and apply the policies, and

    (ii) the employer community in BC, to whom the published policies will be applied.

SUMMARY OF RECOMMENDATIONS

RE: WORKERS AND EMPLOYERS ADVISORY OFFICES

1. The services provided to workers and employers by the Workers' and Employers' Advisory Offices, respectively, must be maintained in the legislation. The Advisory Offices should continue to operate externally from the WCB, and maintain their reporting relationship with the Ministry of Skills Development and Labour.

2. No changes should be made to Section 94(2) of the *Act* concerning the duties to be performed by the workers' advisers.

3. The Workers' Advisory Office should continue providing education and training services to organizations which represent workers with respect to claims matters under the *Act*.

4. Section 94(3) of the *Act* should be revised so that the Employers' Advisory Office has the authority to provide advice, assistance and, where the Employers' Advisory Office determines it appropriate to do so, representation to an employer on any matter within the ambit of the workers' compensation system in BC.

5. Section 95(3) of the *Act* should be revised to permit the Employers' Advisory Office to have access to the WCB's prevention or assessment files, as well as its claims files, with respect to any matter that the Employers' Advisory Office is dealing with on behalf of an employer.

6. The Employers' Advisory Office should continue providing educational and training services to the employer community.

7. Both the Workers' and the Employers' Advisory Offices should be provided with sufficient and equivalent funding to adequately discharge their mandate under the *Act*.

SUMMARY OF RECOMMENDATIONS

RE: OCCUPATIONAL HEALTH AND SAFETY

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1. The *Act* should be revised to provide the Lieutenant Governor in Council with the authority to approve the occupational health and safety regulations to be promulgated under the *Act*.

2. The WCB should maintain its role with respect to the development of the occupational health and safety regulations to be approved by Cabinet.

3. The requirement in Section 226(1)(b), that the WCB must hold at least one public hearing on the proposed regulation, should be deleted.

4. Section 229 of the *Act* should be deleted, regardless as to whether the authority to make occupational health and safety regulations is held by the WCB or by the Government.

5. The Appeal Tribunal must have the statutory authority to direct the WCB to vary or cancel any current or previous Prevention Order, upon which the Prevention Division may have relied to impose an administrative penalty or to initiate a prosecution.

6. In the event that the adjudication of discriminatory action complaints remains within the workers' compensation system, the legislation would specify that the initial decision-maker's determination would be subject to only one level of review/appeal – by the external Appeal Tribunal. In other words, no application could be brought to the internal review process from any determination under Division 6 of Part 3 of the *Act*.

7. The *Act* should be revised to incorporate the appropriate provisions concerning the worker's right to refuse unsafe work, even if that means simply reproducing Sections 3.12 and 3.13(2) of the *Occupational Health and Safety Regulation* within the *Act*.

8. Section 73 of the *Act* should be deleted.